UNIVERSITY OF ALBERTA

COURTING COLONIALISM?

The Juridical Construction and Political Aftermath of Métis Rights in *R. v. Powley*

by

Christian Andersen

©

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Abstract

This dissertation is the culmination two goals. The primary goal centred on an investigation of juridical constructions of Métis Aboriginality through an examination of the court files of a recently decided Aboriginal rights case, *R. v. Powley*. Analyzing factums, expert reports, testimony and the court decisions at both the Court of Appeal for Ontario and the Supreme Court of Canada, I investigated how legal actors positioned Métis Aboriginality in light of their (apparent) 'mixed bloodedness'. Using insights harnessed from various bodies of critical legal theory and Pierre Bourdieu's concept of social fields, I analyzed the various discursive constructions of Métis Aboriginality with respect to the purpose, meaning, proper chronology and role of 'blood quantum' in its inclusion in section 35 of the *Constitution Act, 1982*. In doing so, the dissertation demonstrates the persistence in contemporary Canadian jurisprudence of racist discourses of racial and cultural purity which originally anchored nineteenth century Canadian constructions of Aboriginality. Although Métis were finally ordained as 'fully Aboriginal' at the Supreme Court of Canada, Aboriginality was itself still positioned as a historical, pre-colonial phenomenon. This is discouraging for Native communities formed after (and in reaction to) the colonizing projects of the Canadian state, since they fall outside the protective ambit of section 35 Aboriginal rights.

The secondary goal, pursued more briefly, consists of positioning 'Law' as an antagonistic and fissured set of *social fields* to demonstrate the shortcomings of attempts to understand 'Law' as constitutive. That is to say, this research demonstrates how different fields of 'Law' compete with each other in a hierarchical playing field such that court victories can be used by Métis political organizations at the expense of other areas

of 'Law'. This fracturing necessitates an analytical movement away from understanding 'Law' as a single entity to an analytical lens which attempts to understand the tensions and antagonisms involved in the reproduction of 'Law'. Although the smoke has yet to sufficiently clear from the *Powley* decision, the fact that at present we fail to hold a clear understanding of the court case's effects should give pause to theorists who seek to imbue 'Law' with a constitutive power it neither possesses nor deserves.

Acknowledgements

My convocation in June of 2005 will mark nearly nine years since I moved to Edmonton in 1996 to begin Sociology's doctoral program at the University of Alberta. During this time, I have acquired debts to a surprising number of people. Although thanking them in a document that possibly less than a dozen people will ever read seems a mean bargain for their support, I nonetheless would like to take the time to acknowledge it. Beginning on a financial and research note, I would like to thank the Social Science and Humanities Research Council, the University of Alberta, the Department of Sociology and the National Aboriginal Achievement Foundation for their financial assistance. Additionally, my thanks to the School of Native Studies (in particular Frank Tough and Ellen Bielawski) and the Provost's Office at the University of Alberta for allowing me a semester's leave to take up a visiting professorship as the Hudson's Bay Company Chair in Métis Studies in the School of Canadian Studies, Carleton University. This leave played a crucial role in allowing me to finish a draft of my dissertation. Finally, my thanks to Peter Lemmond, Clem Chartier and Joe Sawchuk for making available, free of charge, some of the court documents used in the dissertation.

My thanks as well to the support staff at the Sociology department (particularly Flora, Carol and Lynn) for their cheerfulness and professionalism. I would like to thank Lynn Van Reede in particular for her assistance during the time my father passed away. Additionally, my sincere thanks to Jean at the Office of Graduate Studies and Research, who saved my financial bacon more than once. Likewise, as a new professor I have enjoyed the support of James, Pat, Donna, Pam, Bev, Lana and Betty in their various capacities at the School of Native Studies. It is never a good idea to get too big a head around Native women, and since (apparently) it can happen without me even knowing it, Bev and Lana thoughtfully take the time to point it out to me. I thank them for their diligence ;-)

Regarding my dissertation project, I'd like first to thank my supervisory committee members, Sourayan Mookerjea and Derek Sayer. No matter how busy he was, Sourayan stayed committed to my research project from beginning to end, entertaining rushes of numerous queries and then long silences (some lasting years!) with equal patience and humour. Likewise, although Derek's approach with me was fairly hands-off, our intellectual association over the years has turned on his ability to encourage my research in new, unforeseen directions by asking one or two simple, pointed questions. I thank him for his confidence, and for agreeing to sit at my defense, by phone, from England. Under considerable time constraints and despite their busy schedules, Lise Gotell (Department of Women's Studies) and Bryan Hogeveen (Department of Sociology), agreed to sit on my committee at the last minute. They were crucial to my ability to defend in a timely manner and for that, I thank them. As well, I would like to express my gratitude to Dr. James Tully, Trudeau Scholar and Distinguished Lecturer at the University of Victoria, for agreeing to sit as the dissertation external and for undertaking such a lengthy and scholarly reading of my project on such short notice.

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Continuing on an academic note, several scholars knowledgeable in Law and/or race/Aboriginal issues generously conversed with me in person and over email; in particular I would like to thank Jennifer Kelly, Joe Magnet, Brad Morse, George Pavlich, Jon Simon, Jean Teillet, Frank Tough (again) and Jeremy Webber. As well, many indigenous scholars provided friendship and much-needed intellectual guidance: Taiaiake Alfred, Maria Campbell, Paul Chartrand, Roger Maaka, Brenda MacDougall, Audra Simpson, Cori Simpson and Cora Voyageur. My thanks to Roger in particular, who has become a *kaumatua* (elder) to me; I have benefited greatly from his wisdom, scholarship and friendship, and from his openness to taking off on road trips at a moment's notice. Likewise, I owe a debt of gratitude to Maria for agreeing to travel those many hours to be at my defense to give the opening and closing prayers.

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Enrolling in a doctoral program and completing a dissertation often necessitates being away from home far more than we would prefer. Yet I was never made to feel guilty for my time away and in fact, was always welcomed home with open arms (and stew and bannock!) So, to *nemama*, *kokum*, Karen (and the boys), Clayton and to my enumerable (although I suppose I could probably count them with enough fingers) aunties, uncles and cousins, thanks for your support and for putting up with my absence and my seemingly endless excuses for why I couldn't visit more or stay longer. As well, although my old man passed away in June of 2000, I still argue with his memory from time to time. My father and I did not see eye to eye on much, but for someone who argued as much as he did, he was a surprisingly good listener – hopefully at least a little of both those qualities rubbed off on me.

Finally, I would like to acknowledge the love, friendship and support of my girlfriend, Nish Wachocka, who over the past three-and-a-half years has had the unenviable task of enduring all that comes with a partner attempting to juggle a tenure-track appointment and the writing of a dissertation. Although I'm sure I fail to adequately demonstrate my appreciation for having her in my life, thankfully the same cannot be said for her. Thanks, babe!

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INTRODUCTION

Nestled in a Precambrian escarpment between the vast expanses of Lakes Huron and Superior, the small city of Sault Ste. Marie, Ontario makes up for in history what it lacks in population. 'The Soo' as it is known to locals, sits astride one of the major routes of the centuries-old sub-arctic fur trade; although incorporated as a city in 1889, fur trade communities and earlier migratory Cree and Anishinabe settlements predate this eventual status by centuries. Today, the Sault Ste. Marie region of Ontario remains situated in a frontier landscape of rocky crags, old growth forest with mixed vegetation and, of course, immense waterways[1]. These geographical features make this area an outdoor recreational paradise in the summer and, of more specific interest to this research, a prime moose hunting territory in the fall.

On a cool autumn day in October of 1993, a father and son shot a bull moose on Old Goulais Bay Road, minutes outside Sault Ste. Marie's city limits. Instead of attaching a provincial hunting tag to the moose's ear, Steve Powley (the father) affixed a tag with his Ontario Métis Aboriginal Association number and a statement which read simply: "harvesting my meat for the winter". Acting on a Crime Stoppers tip[2], Ontario conservation officers made a visit to the Powley residence later that day, resulting in the confiscation of the moose carcass and the Powleys' rifles. The following week, Steve and Roddy Powley were charged with hunting without a licence and unlawful possession of a game carcass, in contravention of s.46 and 47(1) of the *Game and Fish Act, R.S.O. 1990.*

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[1] http://www.chrs.ca/Rivers/StMarys/StMarys-F_e.htm#1 (April, 2004).

[2] http://www.Métisnation.org/news/04_MAR_StevePowley_Jean_Interview.html (April, 2004).

In their defense, the Powleys' lawyers argued that the Powleys were Métis under section 35[3] of the 1982 *Constitution Act* and as such, the existing Ontario provincial wildlife regulations constituted an unjust infringement on their Aboriginal right to hunt for food. That is to say, they failed to accord a priority to constitutionally protected hunting rights over those not protected (i.e. non-Aboriginal recreational hunters), nor did they require local First Nations hunters to hunt according to the provincial regulatory scheme. The original trial court judge agreed with the Powleys' legal teams' assessment and the Ontario provincial Crown appealed to the Ontario Superior Court. The Ontario Superior Court unanimously upheld the Powleys' right to hunt for food, so the Ontario Crown appealed again to the Court of Appeal for Ontario, who upheld the Ontario Superior Court's decision. Finally, the Ontario Crown appealed to the Supreme Court of Canada, which also ruled in favour of the Powleys' section 35 Aboriginal right to hunt for food.

In originally deciding for the Powleys, the Ontario Court of Justice followed a modified version of the section 35 Aboriginal rights test set out for First Nations in the 1996 Supreme Court of Canada case *R. v. Van der Peet*. The presiding judge decided that prior to the imposition of European colonial regimes, Sault Ste. Marie 'and surrounding environs' constituted a rights-bearing Métis community and that hunting formed an integral part of that community's culture. Further, he ruled that hunting remains a central part of the contemporary descendents of this Sault Ste. Marie's Métis community and that the Powleys were rights-bearing members of this community. As such, the Powleys were entitled to exercise a section 35 constitutional right to hunt for food. This entitlement was upheld in each subsequent level of appeal, including at the Supreme Court of Canada.

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[3] the relevant parts of section 35 of the *Constitution Act, 1982* read: s. 35(1) "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed"; and s.35(2) "In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada" (http://laws.justice.gc.ca/en/const/annex_e.html#II – April, 2004) .

In confirming this section 35 right, the Ontario Court of Justice originally stipulated a three part test for verifying membership in a rights-bearing Métis community: 1) self-identification as Métis; 2) a genealogical connection to members of a historical Métis community; 3) acceptance by the local Métis community. This three pronged test was loosened during the first appeal to the Ontario Superior Court, which suggested the requirement of an ancestral 'blood' connection was unfair to Métis community members who were adopted by Métis parents but who were not 'genetically' Métis (whatever we might take that to mean). The court thus loosened the genealogical connection requirement to an 'ancestral family connection'. The three judge panel of the Court of Appeal for Ontario found that whether a genealogical 'blood quantum' or a less stringent 'ancestral family connection' was required was, though relevant, unimportant with specific respect to the *Powley* case because the Powleys met the test in either case. Likewise, the Supreme Court of Canada argued against a strict blood quantum measure but ultimately decided that the exact contours of Métis rights-bearing membership would await a different fact situation through a future case.

Additionally, in upholding the Powleys' right to hunt for food, each level of court admonished the Ontario provincial government to begin resource harvesting negotiations with Métis people living in Ontario through their representative bodies, which in this case included the Métis Nation of Ontario (officially incorporated in 1994) and the Ontario

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Métis Aboriginal Association (incorporated in 1971). Despite the tensions which exist between these two Métis organizations, both were subsequently given seats during negotiations with the Ontario government's Ministry of Natural Resources. As the Ontario provincial Crown appealed each level of the court case, the courts became increasingly insistent that the Ontario government negotiate in good faith with the Métis organizations. In this sense the *Powley* decisions provided Métis political organizations in Ontario with the potential to advance progressive social change in the Ontario bureaucratic field[4], albeit in the narrow context of subsistence hunting rights.

Although the Ontario Court of Justice, Ontario Superior Court and the Court of Appeals generated relatively little public interest outside of Sault Ste. Marie itself, the Supreme Court of Canada victory resulted in a groundswell of media attention from Canada's major newspapers as well as national television coverage from both CTV (Canadian Television) and by the CBC (Canadian Broadcasting Network), Canada's two major national television news outlets. Part of this sudden interest results from the fact that the *Powley* decision is the first Métis rights court case to be argued at the Supreme Court of Canada. In addition to securing quotes from Métis political leaders and the Powleys' lawyers, the media also recorded responses from Ontario provincial and Canadian federal officials. All of this is to say that as a media event, the *Powley* decision generated national coverage. And while silence would have been as sociologically interesting as the actual response, the eventual decision struck a chord in the Canadian media that positioned the decision as an example of Canada's liberal and generous relationship with 'mixed blood' Aboriginal peoples.

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[4] The bureaucratic field is Bourdieu's answer to 'the state' or perhaps more accurately, to

In addition to the actual court decisions, *R. v. Powley* generated some twenty-eight hundred pages of court case files at both the Court of Appeal for Ontario and the Supreme Court of Canada. Given this wealth of records and its focus on an area relatively new to Canadian Aboriginal rights commentary, *R. v. Powley* also opened up a host of sociologically interesting areas for investigation. Two were of particular interest to me, one by virtue of the fact that I am a doctoral student in sociology, the other because I am Métis, part of a Métis family from northern Saskatchewan. My location in each of these two communities – academic and familial – led me to read the decisions with some interest.

With respect to my interest in sociology of law, the courts (especially the Supreme Court) in Canada hold a powerful position in shaping the contours of contemporary Canadian politics. In the post-*Charter of Rights and Freedoms*[5] era, 'minority' groups have employed litigation as part of broader political strategies to create spaces of freedom and equality for the groups to which they claim allegiance. Like feminists, gay and lesbian activists and First Nations litigants before them, the Métis have turned to the courts to force recalcitrant government agencies to sit down and negotiate distinctive relationships.

Despite the fact that using the courts is currently proving useful, however, at one level this research focuses on demonstrating how a turn to litigation puts Métis[6] litigants

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state institutions (see Bourdieu, 1994).

[5] The *Canadian Charter of Rights and Freedoms* became law in 1985.

[6] The term 'Métis' continues to elude a settled definition. Throughout the dissertation the term refers various to a specific socio-political category with distinctive cultural symbols but is also used to more generally signify non-status, self-identifying individuals of Native ancestry – when employing the term I will note the sense in which I am using it.

between a rock and a hard place. To avoid the courts in their struggle to redress perceived injustices is to risk losing the associated power that such victories often produce in negotiations with provincial governments. Indeed, Métis political organizations had previously exhausted non-litigation political gains; although more broadly these efforts had met with early success in the inclusion of 'Métis peoples' section 35 of the *Constitution Act,* 1982, their final 'throw' using non-litigation methods ended in the defeat of the *Métis Nation Accord*[7] with the death of the 1992 *Charlottetown Accord.* More recently, the Métis Nation of Ontario was stonewalled in its attempts to negotiate distinctive Métis harvesting policies with the Ontario Ministry of Natural Resources. This precipitated a turn to litigation as part of a broader political strategy.

However, litigation is a dangerous game. In addition to the often prohibitive cost, the distinctive logics of the courts tend to elevate the risk of ensconcing stereotypical representations of Aboriginality which require the demonstration of a pre-colonial existence of the contemporary community practices for which they seek constitutional protection. That is to say, Aboriginal authenticity is located in the past – real Aboriginality *was*, rather than *is*. Such constitutional protections anchored in these discursive constructions are of little direct relevance or benefit to the bulk of contemporary Métis, especially those who live in urban areas with problems and concerns of little direct relevance to the distinctive court logics which underpin legal discussions of section 35 Métis rights. Moreover, such court cases also tend, in the entirety of the court case files which accompany courtroom litigation, to produce knowledges which are similarly based on the narrow constructions of Aboriginality. In the forum of the courts, these knowledges and the power relations which underpin them possess a powerful ring of truth, due to the court's position as a powerful truth claim (Foucault, 1980) in contemporary Canadian society.

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[7] The Métis Nation Accord dealt with issues pertaining to the constitutional relationship between Métis political organizations and the Canadian state. Perhaps most importantly, the Accord provided a definition of 'Métis', called for the creation of an enumeration registry and set Métis firmly with the jurisdiction of the federal government under section 91(24) of the British North America Act of 1867 (see http://www.ainc-inac.gc.ca/ch/rcap/sg/cj5d_e.pdf).

Regardless of whether they focus on race, class, gender or sexual orientation, critically oriented fields of legal scholarship share in common a concern with laying bare the power relations concealed within 'law's' (though strangely, generally not legal actors') pretensions to neutrality or objectivity. In exposing the machinations of this power, the veracity of this scholarship hinges on the apparent social fact that something called 'law' possesses the ability not only to rearrange existing power relations between pre-formed groups but to form the very social entities they rhetorically preside over. In this sense, 'law' is argued to hold a powerful pull over the very processes of knowledge production and thus, identification processes of minority communities (see Crenshaw, 1995; Gotell, 2003; Haney-Lopez, 1996). This emphasis on the direct relationship between identity formation and 'law' is often encapsulated under the term *constitutive legal studies*[8].

Surprisingly however, an analysis of this relationship ended up playing a relatively minor role in the dissertation. I did not begin with this intention. In fact, with respect to my specific interest as a Métis person in the *Powley* decisions, 'identity' and my thinking about how Métis identity was constructed in (and perhaps more importantly, by) contemporary Canadian 'Law' was important in my initial choice to study them. When the Powleys won the original case in 1998, it came to light that Steve Powley was 'only' 1/64th Aboriginal[9] while his son Roddy was 1/128th. A Native friend remarked at the time, 'Christ, *Cher* has more Native blood in her than they do!' His remark irritated me both because he should know better, but also because to be honest I agreed with him. Despite the fact that I am supposed to be relatively enlightened about the pernicious and violent impacts of racism and racial categorization on Native communities, I reacted with a similar indignation. When I began the dissertation, I framed the issue as one in which someone who (by virtue of his 'low blood quantum') was so manifestly 'non-Native' was illegitimately using the term 'Métis' to gain rights meant for a narrower, more embattled group of Métis.

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[8] The term 'constitutive legal studies' is also used in a slightly different context to position 'Law' as an internal rather than external entity, i.e. as something constitutive of how we understand our social realities. In the present research I use the alternative term

Even now as I complete this dissertation my sense of unease remains; it is now garbed in justifications stemming from the Powleys' refusal to take the stand in their own defense[10]. Nor, as it turned out, were the Powleys particularly involved in the local Sault

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'legal consciousness studies' to describe this body of literature to avoid confusion with my own use of the term 'constitutive'.

[9] As discussed later in the dissertation, this fractional arithmetic is positioned as an important correlate in the dismissal of self-identification as a measure of legal 'rights-bearing' authenticity.

[10] Part of the reason for this is perhaps the fact that Steve Powley did not even know he was Métis until he was in his mid-40s. "I was a white man right up until a few years ago," Powley, 54, said in an interview. ""My mother would not admit she was native. I had red hair just like him," he says, nodding toward his son Roddy, 29. "She said we had just a tiny bit of native blood."" (*Toronto Star*, March 17th, 2003: A10). Thus, his lawyers were perhaps worried that neither he nor his son would hold up well under questioning. Additionally, Steve Powley was in declining health during the years of the trials and

Ste. Marie Métis community, although public participation is hardly a requirement for being Canadian, let alone Métis. I couldn't pinpoint the source of my discomfort until another Native friend of mine joked that I was probably scared of 'big whitey taking over'. That is to say, 'whitey' – defined as those who, despite their increasingly tenuous 'blood' connection to original indigenous inhabitants, continue to self-identify as some category of 'Native' – constitutes an enormous threat to a key marker of legitimacy held by many Aboriginal people, namely blood quantum (see Churchill, 1999; Hamill, 2003; Sturm, 2002).

All of this is to say that I originally planned to look at the impact of *R. v. Powley* on 'Métis identity' and more specifically, to decry the fact that 'Métis' was increasingly becoming a 'default' identification category for those who could not otherwise claim a Aboriginal legal identity. As I read further into the court files, however, it quickly became clear that the issue was far more complex, for two reasons. First, it became apparent that 'law' simply does not work the way constitutive legal theorists say it works, which is to say it does not constitute social relations or identities. Or at least, different legal spheres influence social relations in distinctive ways and with different levels of intensity irreducible to homogonous analyses of something called 'law'. Once this uniformity was fractured, I had no choice but to jettison one of the bolder claims made by constitutive legal theorists, that 'law' directly constitutes identities in ways that harden

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appeals, so much so that he recently passed away after a long battle with diabetes. In one of the many ironies of this case and of Métis politics, he has since been held up by various Métis political organizations as a 'Métis hero' (see http://www.metisnation.org/ news/04_MAR_StevePowley_Jean_Interview.html - April, 2004).

the character of inequality and marginalization they endure in their relationships with the (Canadian) state.

Second, although the notion of 'purity' did not directly constitute a direct theme in the court files for either the Court of Appeal for Ontario or the Supreme Court of Canada decision, it nonetheless made its presence felt more complexly in the larger context of Métis origins as a post-contact Aboriginal group, and of community membership. Crown attorneys attempted to disqualify Métis as rights-bearing Aboriginals by virtue of their post-contact origins and more specifically sought to do the same with the Powleys as rights-bearing Métis by equating their ancestors' successive 'marrying out' (i.e. choosing Euro-Canadian partners) with a loss of cultural legitimacy[11]. In these senses, Crown officials conflated 'impurity' with cultural illegitimacy as a means of attempting to render the Powleys unworthy of section 35 rights. What is particularly interesting about these discourses is that it seems that all legal actors involved held a tacit consensus that the Powleys' ancestors self-identified as 'Métis'.

This research is thus positioned at the intersection of two important issues: (1) an elaboration of the persistence of discourses of racial and cultural purity which bulwarked nineteenth century Canadian state building, through an examination of the ways that contemporary Canadian courts attempt to position the legitimacy of 'Métis' communities as Aboriginal[12] people, both with respect to anxieties presented by their post-contact origins and their mixed ancestry; and (2) a demonstration of how what Stoler & Cooper

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[11] My own initial knee-jerk reaction was closer to the Crown's view than I would readily like to admit.

[12] Their position as *an* Aboriginal people, although rhetorically central to their inclusion in section 35 of the 1982 *Constitution Act*, played a relatively minor role in the case.

(1997) refer to as the 'ambiguities of colonial rule' has contemporarily exerted itself through a fissuring of contemporary Canadian 'law'. This fissuring has created a situation in which a formerly homogenous colonial artifice used in the subjugation of indigenous people has now potentially become a source to advance progressive (albeit limited) social change. Importantly, this situation results not from some teleological change in Canadian society from a more to a less racist society but rather, is a serendipitous result of tensions between different domains of legal operation. That is to say, it results from the positioning of what Pierre Bourdieu terms a *juridical faculty* (i.e. a belief in the truth of jurisprudence) over that of a non-juridically political one.

Regarding the first issue of cultural and racial purity, in the context of the *Powley* decisions the courts encumbered themselves with the task of attempting to fit the square peg of Métis legal categories into the round hole of precedential First Nations court logic. This encumbrance required a reconciliation of the social fact of Métis as an entirely post-contact Aboriginal category with existing case law previously identifying the point of contact as the crucial demarcation line for properly recognizing the Aboriginality of Aboriginal communities in non-title based section 35 claims. The courts undertook this conversion in two ways. First, they tacitly endorsed a more robust construction of Aboriginality which, instead of presupposing that the mere presence of Europeans irrevocably tainted it, required the effective imposition of a European or Euro-Canadian colonial regime. In this context, this 'effective sovereignty' was deemed to fatally interfere with the land-related ways of life of Métis communities and thus, constituted a proper demarcation point for determining the date of their Aboriginal authenticity. Second, the court incorporated Métis into section 35 by dismissing 'blood purity' as a legally significant category for recognizing Métis rights-bearing community members – in that sense, the court banished 'blood purity' (though interestingly, not necessarily 'mixed bloodeness') as a discourse worthy of juridical attention.

Regarding the second issue of fracturing 'law', the specific tack I take means, for reasons which will become obvious, that this dissertation isn't about law and society. It isn't about race and law, still less about race *in* law. Instead, it examines the specific efforts of Métis political organizations to resolve historical grievances and to seek clarification for existing Aboriginal rights by using the courts as a 'symbolic club' (McCann, 1998) in their struggles against Canadian provincial governments, part of what Pierre Bourdieu (1994) refers to as the 'bureaucratic field'. Métis have used the specific resource of the courts primarily because the federal and provincial governments in Canada (and more specifically their Ministries of Natural Resources or equivalent) rarely negotiate with Métis political organizations unless and until forced to do so by the courts. That is to say, a distinction is presented between courts and other forms of law, with a specific emphasis on how the present tensions existing between courts and policy makers produce a situation which allows Métis to 'get their foot in the door', so to speak.

The Anishinabe legal scholar John Borrows (1997a) argues that it is true that something of the complexity of Aboriginal communities, cultures and histories is lost in the translation of their[13] social issues into juridical ones, but what else do they have?

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[13] I feel some anxiety about how to identify with the groups I am writing about. On the one hand, I am Métis and more generally identify as Native and as such feel a certain connection to the material. On the other hand, however, I do not want to position my dissertation as somehow speaking on behalf of *any* Métis community, mine in northern Saskatchewan or that in Sault Ste. Marie. Thus, for the purposes of this dissertation I position myself externally, using the article 'their'.

Given the relatively powerful political position of the Canadian courts, the success (although uneven) of previous Aboriginal rights litigation, and a distinct lack of institutional resources, litigation represents an attractive political strategy for Métis political organizations. Thus, sometimes the potential benefits of litigation outweigh the risks. Sometimes, to turn E.P. Thompson's (1975) famous phrase (if not his underlying sentiments) on its head, 'Law' represents an unqualified lesser of two evils.

However, I think it is also the case that in much the same way as Corrigan & Sayer's (1985: 5) "…states…state[14]", Canadian courts 'court'. That is to say, they encourage (and thus help to reproduce) a narrow range of 'acceptable forms and images' of Aboriginal individual and collective identity. I am not arguing that courts possess anything like the directly constitutive power of states; instead, my argument is that courts and their cases set in motion a particular episteme[15] for perceiving Aboriginality. This episteme is shaped both by contemporary Aboriginal participation in the court cases but also by the boundaries of precedent set during early colonial relationships (see Bell & Asch, 1997). Ultimately, legal actors continue to produce interpretations which cling desperately to notions of 'long ago, far away' Aboriginality. Whether these legal actors, who believe deeply in the effectiveness of 'Law' as a means of addressing issues of Aboriginal inequality, understand the extent to which their activities actually reproduce such stereotypical representations (and the costs associated with this reproduction) is explored below.

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[14] Corrigan & Sayer's (1985: 5) full quote is as follows: "…states…state….They define in great detail, acceptable forms and images of social activity and individual and collective identity; they regulate, in empirically specifiable ways, much – very much, by the twentieth century – of social life".

[15] I'm using the term episteme slightly more specifically than did Michel Foucault, with whom the term is normally associated. For Foucault, epistemes set the parameters within which the validity of discourses is evaluated. They constitute the *a priori*, "defin[ing] the conditions within which [one] can sustain a discourse about things that is considered to be true" (Foucault, 1973: 157). Modernity and its attendant knowledge systems is the dominant episteme of our age – my argument here is that race, as constitutive of Canadian modernity, constitutes a key *a priori* in contemporary Canadian society. Owing to Bourdieu's more complex understanding of how social reality is mediated through a

Bearing in mind these underlying theoretical and empirical issues, this dissertation is divided into seven chapters and a conclusion. The first chapter discusses the enormous social power held by discourses of racial and cultural purity, in both the late nineteenth century colonization period of western Canada and contemporary Canadian society. Racial and cultural purity constitute two of the founding modalities (and anxieties) of colonialism and indeed, to the extent that these categorizations continue to dominate legal discussion about Aboriginal rights (whether for *or* against), they constitute in a contemporary setting the residual tensions of empire upon which late nineteenth century Canadian state building activities were constructed.

Specifically, the category 'Métis' contemporarily violates what Steve Martinot (2003) refers to as the *purity condition* in two ways: 1) it lacks a pre-European contact origin; and 2) it emphasizes the intertwining of indigenous and European roots. Chapter one elaborates the position of racial and cultural purity-as-difference in colonial Canada, particularly with respect to this category. The argument presented is that nineteenth century colonial relationships between government administrators and 'indigenous' communities – and the colonial attempts to geographically place racialized communities – were largely predicated on sensibilities which perceived an unbridgeable gap between

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series of more 'local' social fields, however, episteme is used more locally to indicate the *a prioris* upon which courts base decisions about Aboriginal rights.

Canadian and indigenous, citizen and 'other'. Although this gap was partially marked by racial purity through blood quantum, it was equally marked by issues of cultural purity through the construction not only of lifestyle criteria but the geographical sequestering of these 'lifestyle communities' through the imposition of legislative enactments. The issue of lifestyle is emphasized in particular because it plays a prominent role in the *Powley* case files at the Supreme Court level[16].

Part of the imposition of these lifestyles was achieved through *Indian Act* legislation, enacted at various dates throughout the late nineteenth and early twentieth century. In this way, the *Indian Act* constituted the historically central legal instrument through which colonial administrators attempted to impose Canadian Law on Aboriginal communities. Canadian Law today is, however, far more complex and contradictory than it was in 1876. Chapter two specifies this complexity by fragmenting the supposed uniformity of contemporary 'law' into a series of interlocking *social fields* (Bourdieu, 1996, 1990; Bourdieu & Wacquant, 1992), with a particular emphasis on the Canadian courts. Positioning the courts in this manner differs from conventional attempts to position 'law' as a homogeneous institution in that I make no claim that it operates unitarily or uniformly. Instead, this model emphasizes both the internal operations, attitudes and practices of legal agents in the production of judicial decisions and the tensions between different fields of 'law' and in doing so, likewise, its crevices and interstices demonstrate an important site of what Foucault (1980) refers to as the 'strategic reversibility' of power relations.

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[16] To the Supreme Court of Canada's credit, it played no role in the actual decision.

Importantly, the (partial) autonomy of courts thus stems from these internal practices and understandings, and thus, court decisions cannot be written off as the straightforward effects of a larger structural imperative, such as racism, patriarchy or class disparities. That is to say, there is something unique about juridical struggles which requires specific explanation. This fissuring of 'law' into courts and legislature, and the hierarchy of their placement in the Canadian nation-state also anchors my critique of a legal consciousness theory dynamic which tends to find 'law' everywhere without any sustained discussion for why 'its' presence in some areas is more pertinent than in others.

Although it stems from a different methodological approach, situating the courts as social fields shares many of the sensibilities anchoring other sociology of law traditions. Three traditions in particular are elaborated in chapter two: critical legal studies, critical race theory and Foucauldian-based discussions of 'law'. We draw upon these insights (1) to position the courts as political and judicial decision-making as 'under-determinate'; (2) to demonstrate the extent to which racial ideologies continue to shape judicial decisions in important but unobvious ways and (3) to understand courts as a form of knowledge production and mobilization by positioning it on the one hand as a dominant discourse in contemporary western societies (i.e. as 'law') and on the other as an entity whose knowledge and social power is limited by the discursive boundaries presented by legal actors. Chapter two begins with these three legal traditions, critiques them, and retools them to fit more squarely in an understanding of the courts as a social field.

More briefly, chapter three 'racializes' the Canadian courts by demonstrating two sources important to juridical constructions of Aboriginality. First, I show how the racialized discourses produced in precedent impacts the *Powley* case through a discussion of two important Supreme Court of Canada cases, *R. v. Sparrow* (1990) and *R. v. Van der Peet* (1996) (including the majority and two dissenting opinions of the latter). Second, I also demonstrate how dominant Canadian discourses about indigeneity influence juridical constructions of Aboriginality when legal actors venture into constitutional-legal waters for which little precedent exists. In particular, juridical faculties around *purposive reasoning* (as set out in *R. v. Sparrow*) require judges to be fair (i.e. to balance interests bearing in mind the specific intent of section 35), but only within the realm of what they determine that indigenous communities 'deserve'. These determinations are powerfully shaped by legal actors' understandings about what it means to be Aboriginal. This is explored through a brief analysis of the 1996 Royal Commission on Aboriginal Peoples (RCAP) a primary vehicle through which Canadian federal government-sponsored 'truths' about Aboriginal people are disseminated and one major source through which history is recounted in the *R. v. Powley* court decisions.

The construction of court cases by lawyers and even their analysis by legal scholars tends to depend heavily on a disciplined legal sense about how to appropriately construct their evidence. This places strong boundaries on what counts as evidence and how legal actors attempt to reform existing attitudes towards what in fact counts as appropriate evidence. The methodology chapter pursues this issue by discussing justifications for the dissertation through a detailed explanation the court case files utilized in my analysis. This includes a discussion of the different 'blocks' of interveners, as well as a brief description of each of the interveners individually and is presented in the context of understanding the legal actors' positioning as members of the juridical field. Additionally, my analysis consists of a Foucauldian-based *discourse analysis*; I will explain its meaning and how it differs from more conventional content analysis.

Chapters five and six contain the empirical analysis. Chapter five focuses on the Court of Appeal for Ontario and outlines the positions taken by the Ontario provincial Crown (the Appellant), the Powleys (the Respondents) and four Aboriginal interveners. This level of court emphasizes the relationship between authenticity and prior occupancy and outlines the different 'scales' used by the legal actors to determine this authenticity. I demonstrate that although it appears as though the courts sided with Métis litigants, in fact the judicial comments of the Appeal Court for Ontario amounted to little more than a modified version of the provincial Crown's factum. Chapter six analyzes the Supreme Court of Canada level of *R. v. Powley*, including the positions of the Powley legal team, the Ontario Crown and eighteen[17] interveners. The relationship between Aboriginal authenticity and prior occupation once again appears prominently in the intervener factums. In addition, however, I analyze the relationship between blood quantum and cultural authenticity. Chapter six demonstrates the lingering traces of blood quantum, even in instances where Métis are deemed 'fully Aboriginal'.

Chapter seven explores the immediate aftermath of the *Powley* decision for Métis political organizations. Analyses which focus on court cases and legal agents' discourses without attempting to situate those cases and discourses in a larger social context are missing a key analytic insight for understanding how and why the courts operate and why their utility extends beyond the grounds of the cases they hear. In this context, chapter seven elaborates the prior political successes and failures of Métis political organizations in general and the Métis Nation of Ontario in particular to set the backdrop within which the *Powley* decisions can be understood as an important component of broader Aboriginal political strategies. Finally, it critiques sociology of law traditions which implicitly draw an unproblematic correlation between judicial decisions and their eventual impact on social relations. Their impacts are rarely uniform nor, equally importantly, directly constitutive. Chapter eight concludes with a synthesis of the dissertation materials and a discussion of future avenues of research.

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[17] The Attorney-General for Québec's factum was written entirely in French. Since I neither speak nor read French adequately enough to properly analyze their court factum, I do not have ready access to this data. However, the Attorney-General for Québec's

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factum and oral argument comprises only thirty pages out of the twenty-eight hundred and as such is not as large a problem as if it made up a substantial portion of my data.

CHAPTER ONE:

'MIXED BLOOD MAGICK[18]'

> So, I'm having coffee with this treaty guy from up north and we're laughing at how crazy 'the mooniyaw[19]' are in the city and the conversation comes around to where I'm from, as it does in underground languages, in the oblique way it does to find out someone's status without actually asking, and knowing this, I say I'm Métis like it's an apology and he says 'mmh,' like he forgives me, like he's got a big heart and mine's pumping diluted blood and his voice has sounded well-fed up to till this point, but now it goes thin like he's across the room taking another look and when he returns he's got 'this look,' that says he's leather and I'm naughahyde.
>
> Marilyn Dumont
> Leather and Naughahyde (1996)

INTRODUCTION

In contemporary Canadian society the category 'Métis' oscillates between two poles. The first, more dominant pole emphasizes its etymological roots. Here, Métis is associated with hybridity, biological 'mixedness'. The second, less dominant pole depicts Métis as an indigenous socio-political group (a 'nation') which rose to prominence in Canada[20] during the middle and latter part of the nineteenth century. This latter definition downplays 'métis-as-mixed' understandings in favour of identification with and allegiance to a historically and geographically situated nationality. This oscillation has played itself out in discussions around the differences between these 'large-M Métis' (national) and 'small-m métis' (etymological) definitions[21].

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[18] Though I use it in a slightly different way, I borrowed this title (with his permission) from an unpublished paper by Paul Chartrand titled "Confronting Mixed Blood Magick".

[19] 'Mooniyaw' is an Alberta Cree term for 'white people'.

[20] Although for purposes of uniformity I use 'Canada' throughout this research, bear in mind that 'Canada' is a conceit of colonialism – it is not the only name used to describe

Since at least Said's *Orientalism* (1978) it is commonplace to note that the colonial production of knowledge about indigenous communities and identities is as much a reflection of colonizers' categories and desires as it is an accurate portrayal of the communities about which such knowledge is generated. In much the same way that Said argued that the Orient was 'invented' by European intellectuals and colonial bureaucrats for the purposes of settlement, government and 'explanation', so too 'Indians' may well be the invention of the European and Euro-Canadian (Burkhofer, 1978; Francis, 1995). In fact, Francis (1995: 4) goes so far as to say that "Indians, as we think we know them, do not exist. In fact, there may well be no such thing as an Indian". Such claims are anchored strongly in the idea that the 'Indian', rather than constituting a pre-given or self-evident category, is the effect of a specific system of representation which has, through the tremendous material and cultural weight of 'whitestream[22]' (Denis, 1997) Canadian society, produced a register of images which tends to emphasize a severely limited, isolated and de-contextualized range of the realities of being Aboriginal in Canada today.

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these geographies and in some Aboriginal communities despite its best efforts it is not even the most dominant one.

[21] See for example the introduction in Peterson & Brown's (1985) now classic text on Métis issues.

[22] The term 'whitestream' is borrowed from Claude Denis' excellent book *We Are Not You: First Nations and Canadian Modernity*. The term is used to indicate how, although Canadian citizenry are comprised of numerous cultures and communities, the dominant institutional arrangements tend to reflect a predominately Euro-Canadian bias (1997: 13).

Importantly, these representations are (and were) never 'vis-à-vis' – race, as both a physiological and cultural taxonomy, was used to grade or rank sociality in a manner which anointed European groups civilized (read: superior) and placed indigeneity somewhere beneath (Guillaumin, 1982; Stoler, 1995; Young, 1995; also see generally Derrida, 1981). Moreover, such classifications served as linchpin and justification for all manner of violence, domination, displacement and dispossession of 'indigenous peoples'. In the colonial era(s)[23], 'race was everywhere' and because it was everywhere, its organizing categories were largely taken for granted, especially by those in privileged positions. Racial categorization was so 'true', in fact, that by the mid nineteenth century it had become "the organizing grammar of an imperial order in which modernity, the civilizing mission and the measure of man" were framed (Stoler, 1995: 27).

By late-nineteenth century Canada, social relations were moored strongly in these taxonomies and racialized orientations, which served as the basis for the marginalization and attempted destruction of indigenous values, practices and institutions and as such constituted a site of considerable anxiety for colonial administrators. Once encoded in formal colonial policy, such differences transmitted real effects and impacted indigenous communities with increasing intensity in western Canada from the latter part of the nineteenth century onwards. They became manifested through (never entirely successful) prohibitions around spiritual practices, land tenure, hunting and fishing practices, education, freedom of assembly, and even freedom of movement, to name but a few (see

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[23] Colonialism appears in different forms in different places over different times in the five centuries of interaction between Europeans/Euro-Canadians and Aboriginal populations. Thus, I refrain from constructing a single colonial 'era' in Canada.

Carter, 1993; Dickason, 1992; Miller, 2001; Ray, 1996 for an general overview of these colonial strategies).

However, nearly four centuries separate the arrival of the 'Europeans' and the context within which Stoler's (1995) quotation about race as an organizing grammar makes any sense. The 'colonial era' in Canada was geographically and temporally as heterogeneous as any in the imperial world and it is within this heterogeneity that the grammar of race and colonialism collide to form 'Métis' identities. Miscegenation has been a social fact in Canada since the early 1500s – in fact, intermixing with local 'Amerindian' populations constituted a key plank of early French colonial policy for populating 'New France' (see Dickason, 1985). It is not until the expansion of the fur trade political economy in the seventeenth century, however, that the distinctive mixed ancestry communities which anticipated the rise of a separate and distinctive Métis identity arose. By the early 1700s, the political geographies of the fur trade had seen the arrival of a population of people who occupied a distinctive economic niche in the fur trade (see Ray, 1974; Tough, 1996) and who would, in less than two centuries, rise to national political prominence, instigate and oversee the entry of the province of Manitoba into Canada and fade into political obscurity.

In spite of their spectacular and relatively brief rise to political power and the hard fought (and initially, victorious) battles against the Hudson's Bay Company, the Council of Assiniboia (the formal governors of Red River) and eventually the Canadian government, 'Métis' never fit comfortably into colonial policy anchored in the orienting grammars of race articulated by Stoler. This ill fit is partially the result of the fact that the category 'Métis' violated what Steve Martinot (2003) terms the *purity condition*.

> Adopting this purity condition as a dimension of colonialist administration, Europeans initiated a process of separating people, and in particular themselves, from the colonized, on a colour-coded basis, leading ultimately to politically categorizing all others outside the purity condition… (2003: 22).

Martinot's larger point is that the purity condition is a necessary condition in the process of racialization. "Without it, the concept of race to which "white supremacy" refers could not exist. Through this purity condition, whites assessed for themselves the power to define other races as they then saw them – that is, as they saw fit" (Marinot, 2003: 22).

In nineteenth century Canada however, a 'purity' basis was never a particularly useful way to negotiate the unstable 'divide' between the categories of 'citizen' and 'Indian'. Thus, it was paired with additional criteria of lifestyle and indigence. Today, however, the power of cultural and racial purity discourses lingers and its effects are particularly pernicious in the context of 'Métis' identities. Although the Supreme Court of Canada recently decided in *R. v. Powley* that mere mixed Indian and European heritage was necessary but insufficient to constitute a basis for constitutionally protected 'Métis' hunting rights, it is nonetheless clear that this mixed heritage continues to constitute a suppressed core of indigenous authenticity in Canada. In short, the category 'Métis' violates the purity condition in two closely related ways: 1) Métis is positioned to presuppose an intermixing of Europeans and First Nations – thus at one level Métis signifies an issue of dilution of *blood quantum* and in doing so blurs the crucial divisions constructed between white and Indian, citizen and other; and 2) Métis is also positioned as an entirely post-contact category – it lacks origins to a pre-European contact group[24] and thus contemporarily, lacks a pillar of legitimacy as indigenous groups.

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[24] In this dissertation the category 'Métis' is used to denote the intermixing of indigenous people with (what are now referred to as) Europeans. Indigenous communities intermixed

These violations render the Métis immediately suspect both in popular imagination and even among Aboriginal people ourselves (thus the fittingness of Dumont's line in the poem beginning this chapter: "I say I'm Métis like it's an apology"), and are no different in the courts than in real life. Although the racial hierarchies within and outside the courts are marked by the distinctiveness stemming from the distinctive logics and procedures of their respective social fields, they nonetheless bear a marked affinity of more fundamental concurrences about what Aboriginality is. These underscore the vast majority of the legal discourses generated by the various legal actors.

This chapter explores the category 'Métis' with a focus on three issues that bear a strong affinity to the legal discourses contained in the *R. v. Powley* case files. The first issue focuses on the construction of 'Métis' by academics as a pre-colonial identity in the upper Great Lakes region, despite a paucity of evidence about the self identification of these communities. The Powleys' hunting trip took place in the Upper Great Lakes and their legal counsel expressed their (the Powleys') allegiance to the historical communities which populated this region. The second issue elaborates the historical construction of 'Métis' in the context of nineteenth century Euro-Canadian bureaucratic projects focused on the surrender of 'Indian title' and the formation of Indian bands. Importantly, I preface this discussion with a more conceptual discussion of how contemporary scholars

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prior to contact with Europeans and as such no doubt possessed words in their languages to denote this earlier intermixing. In the context of this dissertation, however, 'Métis' is partly positioned as the initial result of liaisons between indigenous women and European men. At the risk of reproducing dominant discourses about the singular importance of European 'blood' in this intermixing, it is precisely my point that the residual tensions of empire which underscore the discourses in *R. v. Powley* emanate from these historical construct this era as a primary demarcation point for demonstrating indigenous authenticity. My point in this section is to suggest that legal constructions of Aboriginal authenticity bear a surprising affinity to those presented by many Aboriginal issues scholars. Finally, as a conceptual riposte to the legal constructions discussed in chapters five and six, part three of this chapter examines a contemporary representation of Métis through a brief discussion of the problems of Census organization around the term 'Métis' in 1996 and 2001.

Importantly, this chapter emphasizes that despite the linkages of 'Métis' to the national memory of Red River, it has always additionally signified an anxiety over the lack of fit with older, more hardened colonial categories of racial difference such as 'Indian' and 'white'. Moreover, it is also important to emphasize that Métis was and remains a 'fuzzy concept' (Bourdieu & Wacquant, 1992) and that this fuzziness is crucial to its use in the conflicting systems of representation within which different legal actors place their arguments.

PART I

Métis as Mixed – the formation of Upper Great Lakes 'Métis' Communities

Who are (the) Métis? In her factum, Jean Teillet (who self-identifies as Métis and was lead counsel for the Powleys) suggests that the *Powley* case "is not a case about all of the Métis in Canada. The evidence at trial focused on the Métis of the Upper Great Lakes generally and more specifically on the Métis community at Sault Ste. Marie, ON. It is their history, their existence and their rights that are in issue" (Powley Factum, 2003:

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liaisons, rather than those of pre-contact indigenous communities. This is the 'mixed blood magick' accorded to European presence by legal actors and academics.

para. 19). The formation of the Powleys' ancestral communities in the Upper Great Lakes region takes place in a 'frontier' space. The frontier is the "outer limits of European civilization" (Eccles, 1969: 1), a geographical area outside the purview of direct government control or 'effective sovereignty'[25]. This latter term refers to activities undertaken by a European power to exert and sustain its control over a particular geographical territory. Effective control is thus associated with both an 'on the ground' control of indigenous inhabitants and the ability to ward off the rival claims of competing imperial powers, rather than merely conveying a symbolic sovereignty through burying a king's coat of arms or the raising of a cross.

Hence, a frontier situation is one in which there is no regional surveying cartography, census taking, imposition of taxes, ability to demand conscription or the right of eminent domain (i.e. the right to seize private land for public use) or the ability to enact and enforce the rule of law over the geographical territory claimed. Frontiers are thus locales rich in natural resources yet outside of the formal control of empirical powers and in fact, were often intensely contested by imperial powers jockeying for geo-political position in the new world. These imperial rivalries in frontier regions form the basis of much of Canada's early history, and they are partly responsible for the new identities formed in the fur trade.

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[25] Legal and historical scholars are in general agreement that effective sovereignty is not merely the result of the simple act of discovering a geographic territory, nor is it the result of symbolic proclamations by the colonial power in a particular region. For example, while such acts as the planting of a plaque bearing a nation's coat of arms in the claimed territory are normally understood as assertions of sovereignty, they are hardly evidence of more sustained bureaucratic control.

Initial European/indigenous contact on the shores of what is now Newfoundland-Labrador and Nova Scotia followed quickly on the heels of Christopher Columbus' 'discovery' of the new world. Searching for a western route to Asia, John Cabot (a Genoese sailing for England) landed on the north shores of Newfoundland-Labrador in 1497, only five years after Columbus' maiden voyage. Less than 25 years later, British, Spanish, French, Russian, Swedish and Dutch sailors had established trade with indigenous North Americans (Dickason, 1992: 99 – figure 6.1). Initially, early contact was based on whaling along the Labrador coast and especially fishing for cod in the rich Grand Banks off the coast of Newfoundland. Soon after, however, a lively fur trade established itself as beaver pelts became the primary trading commodity in what is now Canada (Eccles, 1969: 19; Innis, 1999).

Until it was supplanted by a nineteenth century industrial and agriculturally based capitalism (Bourgeault, 1983; Tough, 1996, 1992), the mercantile fur trade left a profound legacy on the geographical and political contours of what is now Canada (Innis, 1999; Ray, 1999), as well as impacting the distribution of wealth in the late nineteenth century post-mercantile era (Tough, 1996). It became a "socio-cultural complex in which Indians, mixed bloods, and whites were intertwined" (Foster, 2000 [1976]) and early mixed ancestry communities laid jealously guarded in its bosom. In what was to become Canada, the fur trade was the first and, until its demise more than two centuries after it began, most enduring national industry. It formed what Howard (1952: 57) referred to as "the best entrenched political and industrial combination that ever existed".

Given its endurance, it is difficult to overestimate the impact of the fur trade on what is now Canada. To slightly mischaracterize[26] Michael Payne's discussion, a fur trade discourse helps to explain

> population movements, cultural change and adaptation, and political and economic conditions of First Nations. [It] integrated western and northern Canada into both a national and an international economy. The demands of the fur trade drove exploration, technology, business organization, immigration, resource management, attitudes towards the environment, scientific discovery, even who people married and how their children were educated (Payne, 2001: 8-9).

Moreover, Ray *et. al*. (2000: 3) suggest that

> First Nations of western Canada forged their relations with Europeans in the crucible of the fur trade. Successful long-term intercourse required the development of institutions and practices that accommodated the sharply different diplomatic, economic, political and social traditions of the two parties. When First Nations treaty-making with Canada began in the nineteenth century, Aboriginal people carried over into negotiating practices and strategies many long-established fur trading customs that they incorporated into the treaties.

The overall impact of this political economy can be understood as a kind of 'tornado' which cleared a path from eastern to western (and later, northern) Canada, pulling indigenous communities and fur and game bearing geographical regions into its gravitational pull (some more than others), over a period of approximately two centuries. Even after only several generations, this system had such a marked impact on Native communities that many had become almost entirely materially dependent upon European trade goods (Giraud, 1986 [1945]; Ray, 1996, 1974; Ray *et. al.*, 2000: 11; Tough, 1988). While French efforts linked fur trade ventures with larger colonial policy through the granting of trading monopolies to merchants agreeing to establish new world colonies, early fur trading ventures were, as the Ray *et. al.* (2000) quote denotes, never simply matters of economic exchange. In addition to commercial elements, this system formally linked together European nations with indigenous ones in matters of war, diplomacy and marriage. French, English and Dutch traders relied heavily on the assistance of indigenous groups to aid in the struggle for empire that characterized early Canadian history (Ray, 1996: 71-76; see generally Dickason, 1992: 98-162), and early on many of the indigenous nations, seasoned traders and diplomats that they were, skillfully played off and out maneuvered the competing European nations. Conversely however, as fur bearing areas were depleted and as the fur trade moved further inland, indigenous tribes – formerly geographically situated perfectly as middlemen to the more northern and western tribes – suddenly found themselves bypassed by French and British traders who, motivated by a desire to avoid a 'middleman markup', moved further inland to trade directly with the more distant tribes.

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[26] I say mischaracterize because Payne's quote actually refers to examples of 'fur trade centricness' – that is to say, since the 1980s, Payne suggests that researchers have moved away from understanding the fur trade as the single engine driving Canadian historical change. Fair enough. But it still does not detract from the overwhelming impact that the fur trade had on participating native communities whether through their direct participation or through indirect trading with tribes more centrally involved.

> [These] economic aspirations would characterize the commercial fur trade throughout its history and would drive it forward across the continent between the early seventeenth century and the late eighteenth century. Each time a new group of Native middlemen emerged, European traders moved to outflank them. Native entrepreneurs were always at the forefront, drawing new groups into the fur trade, while European explorer/traders followed in their wake (Ray, 1996: 56-7; also see Ray, 1974: 125-136)[27].

Thus, we begin with the uncontroversial premise that the creation of mixed-ancestry identities is coterminous with the geographical expansion of this commercial fur trade and in particular, with the construction of fur trade posts and the traders sent into *le pays sauvage* (Foster, 2001 [1975]: 179), a formation which occurred fairly independently of seventeenth and eighteenth century imperial rivalries. Although various battles and international treaties[28] significantly altered the spheres of geographical control in the new world for both France and Britain, the fur trade itself continued to expand geographically as often in response to the depletion of a particular region's fur base as a result of which European power claimed ownership.

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[27] Additionally, as native tribes assumed the role of the middleman, they played a crucial role in the fur trade. Ray (1974) gives the example of the Cree and the Assiniboine. "They were able to dictate the terms of the trade to Europeans and other Indians alike. Further, because of the nature of the system that evolved, they largely regulated the rate

The Canadian fur trade system was itself characterized by two distinct systems of organization: British and French, or more precisely, the Hudson's Bay system and the St. Lawrence system. The British-based Hudson Bay Company was largely situated in Britain and operated out of a series of coastal posts located on major waterways (such as Hudson's Bay), with a fur trade policy that "immobilized [British traders] in the coastal ports" (Giraud, 1986 [1945]: 126), with the expectation that Native traders would travel to the posts to trade (Ray, 1974: 125). Conversely, the French-based system, strongly tied to France's larger colonial policy, operated primarily out of the New World, in the context of attempts to construct a 'New France' (Brown, 1980: 1-3). In this system, French fur traders penetrated deep into the Great Lakes region, often living among Indian

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of material culture change, and to a considerable extent they also influenced its directions" (Ray, 1974: 70).

[28] In the seventeenth century, the destruction of the French-backed Huronia by the British and Dutch backed Iroquois initially had a devastating impact on French fur trading networks. In the eighteenth century, major treaties between France, Britain and the United States included: the Treaty of Utrecht, 1713 ending the War of Spanish Succession and awarding control of the Hudson's Bay to the British, thereby assuring a constant presence, as they no longer had French attack to fear (Brown, 1980: 8; Ray, 1974: 51); the Treaty of Paris, 1763 signaling the capitulation of the French to the British and signaling the end of the Seven Years War; and the Treaty of Paris, 1783, ending hostilities between Britain and the United States.

tribes for years at a time, and often marrying into the tribes with which they wintered. Each system had distinct features distinguishing it from its competitor(s), and these two systems would give rise to distinctly different mixed ancestry identities[29]. For our purposes, we are particularly interested in the trading practices of the Montréal French (and later, Scottish dominated) fur trading system, for it was the practices of these traders that were to give rise to the eventual formation of Métis identities.

In his discussion of nineteenth century Red River Métis national identities, Ens (1996: 4) suggests that "Métis identity was not defined by biology, blood, or religion". This echoes Foster's discussion of the topic, who notes that on the western plains mere mixed ancestry was never a sufficient antecedent for the formation of a identity distinctive from both European and Indian, but rather, the critical feature was the process by which some 'mixed' children were enculturated differently than others" (Foster, 2001 [1975]: 180). This notion that mixed parentage (one contemporary meaning of 'Métis') was not, in itself, a sufficient causal factor is supported by a good deal of historical research. Dickason (1985: 19) suggests that "it is doubtful that there was any more mixing of the races, in a biological sense, in [the regions of Manitoba, Saskatchewan and Alberta] than there was in the East coast or on the West Coast". Moreover, although Dickason points out that racial intermixing was a feature of French colonial policy in both Canada[30] and other colonial territories, in these early stages of colonial outposts (in Acadia and Québec) children born of mixed unions identified with one or the other of their parents (Dickason, 1992: 31). Indeed, for French voyageurs in 'Indian country', evidence suggests that the majority of children from mixed marriages were initially reabsorbed into the mother's culture. This movement of French *engagés* deep into 'Indian country', a defining feature of the Montréal fur trading system, would however, eventually exert a profound effect on when, where and whether Métis identities were formed (Peterson, 1982: 26; 1978: 47, 59).

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[29] The major difference was between the French and English speaking half-breeds; between 'Métis' and 'Rupertslanders', respectively. Métis identities sprung up in separate communities while English speaking half-breeds were children of fur trade post workers who intermarried with First Nations women whose band lived outside the walls of the fort (see Ens, 1996: ch. 1) .

In his classic text *Indians in the Fur Trade* Ray notes that after losing control of Hudson's Bay territory to the British by virtue of the 1713 Treaty of Utrecht, "the French redoubled their efforts to cut the Hudson's Bay Company off from its hinterland" by building a series of forts north and west, into what is now Manitoba and Saskatchewan (1974: 51-2). It appears however, that these efforts were not novel but rather were merely expanding upon a pre-existing economic and diplomatic networks established by the French (and later adopted by British and American fur traders) to facilitate trade with the Native tribes living in the Great Lakes region (Peterson, 1982: 26). According to Peterson, this system exhibited a number of distinct characteristics, several of which (especially those pertaining to travel, contact and *intermarriage with First Nations women*) were crucial for allowing the formation of Great Lakes identities (1982: 26). This last term is emphasized, as it is well noted that a major impetus of fur trade marriage between European traders (whether English, Scottish or French) and Native women was as a means of cementing trade alliances between the respective forts and Native traders, as well as supplying a vital source of labour for the men (Brown, 1980; Ens, 1996; Peterson & Brown, 1985; Ray, 1996, 1974; Van Kirk, 1980).

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[30] French authorities initially supported intermixing between its French citizens and the local natives, "based on the optimistic view that the native people could be civilized by

Such a practice was merely an extension of existing indigenous trade practices. Ray (1998) observes that "one of the key ways that the Ojibwa cemented trading alliances was through arranged marriages that established kinship bonds with their partners…after contact with Europeans *they continued this ancient practice* to link themselves with the newcomers" (1998: 15-16 – emphasis added). Indeed, Native traders were often so eager to cement these alliances that soon after restrictions were lifted from Hudson's Bay Company post life, post managers were frequently pressured by Native trading captains to take an Indian wife (Brown, 1980: 21). Such relationships served to tie the trader into the Native kinship networks, so much so that one may say without exaggeration that these relationships formed the basis of the fur trade and contributed to the formation of a distinctive fur trade society (Brown, 1980: 51; Giraud, 1986 [1945]: 237-9; Van Kirk, 1980: 164).

A straightforward way to understand the early formation of a mixed blood population in the Great Lakes region (as opposed to the mixing which occurred in the Hudson's Bay Company controlled region) is thus to think about the fur trade in geographic terms. While the mainly English backed Hudson's Bay Company initially controlled the northern corridor – the band across what is now central and northern Manitoba, out to the Hudson's Bay and in trade with the Cree and the Assiniboine (Ray,

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accepting French culture and the Catholic religion" (Jaenen, 1975: 153). Also see Bailey (1969: 112-13).

1974: 13) – the French (and, after the Treaty of Utrecht in 1713, the Scottish) controlled the region south of the Great Lakes, the epicenter of which was the Montréal/St. Lawrence corridor. In the early years of the fur trade, the Hudson's Bay Company enforced strict regulations regarding their post employees. Celibacy and firm discipline were the order of the day, and trade relations between fort employees and Indian traders who traveled to the post were formal and non-personal (Brown, 1980: 10-13). Although these early disciplinary policies were belied by the number of phenotypically suspicious children who sprung up around the forts (particularly after the posts began to serve as a 'home base' for various Indian bands), official Hudson's Bay Company policy expressly forbade (and later, merely discouraged) intermixing/intermarriage between post employees and local Indian women (Van Kirk, 1980: 166).

Conversely, the Montréal–based trading system held a different relationship with their Native trading partners, one that authorized and even encouraged intermarriage between their employees and the women of proximate Indian bands (Van Kirk, 1980: 166). In the early seventeenth century, the Montréal/St. Lawrence trading network traded primarily with the Huron and their trading partners the Anishinabe who were intermediaries for many of the more northern tribes. However, the destruction of the Huron by the Iroquois in 1649 caused the Huron and Anishinabe to flee north to the Great Lakes region for safety. Only a decade later, the French began reassembling their fur trade networks further north in the Great Lakes region (Ray, 1998), taking over the Huron's role as middlemen, filling the economic niche left by their destruction (Ens, 1996: 14-15). These were far from the first Frenchmen in the area; numerous *coureurs du bois* were already in the region in defiance of an official trading ban, and had, through the considerable freedom and hardships such a lifestyle afforded him, attained a "naturally undocile character", "a spirit alien to subordination", and an "independence like that of the savages" (Giraud, 1986 [1945]: 221).

According to Ray (1998: 16), this re-establishment signaled the beginning of sizable intermarriage *àla façon du pays* (in 'the custom of the country') between these indomitable French and French-Canadian fur traders noted above and local Indian women, and with it, the establishment of fur trade posts and seasonal villages, *separate* from proximately located Indian villages[31]. Peterson contends that these new communities of mixed ancestry individuals shared in common two characteristics. First, they were occupationally and materially homogenous with little social hierarchy. Second, the populations were comprised of several generations of the progeny of European/Euro-Canadian fur traders and Indian women, who had begun to marry amongst themselves. As such, "these communities did not represent an extension of French and later British colonial culture, but were rather "adaptation[s] to the Upper Great Lakes environment"" (Peterson, 1985: 41). By 1815,

> tangible evidence of a 150-year-long alliance between men of the fur trade and native women was everywhere in abundance. Throughout the upper Great Lakes region, towns and villages populated by people of mixed heritage illustrated the vitality of the intermarriage compact. The absence of vital records nearly everywhere makes enumeration of the residents of Great Lakes fur trade society difficult; that they were a sizeable and influential population should be obvious, however (Peterson, 1985: 62).

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[31] Ray notes that the establishment of French fur trading networks led to the formation of the Hudson's Bay Company in 1670, which established direct trading links between HBC and the tribes living in the Hudson Bay/James Bay region. In turn, these direct links forced the Montréal-based system to react by penetrating yet further inland, eventually constructing additional settlements (Ray, 1998: 16-17), particularly near what is today Sault Ste. Marie, "which lay astride the major canoe route leading to the northwest from Montréal" (1998: 18).

During this same period of the early 1800s however, the fur bearing animal populations became depleted and the weight of agriculture-based community expansion became heavier. This resulted in the collapse of the fur trade in the Great Lakes region, and with it, the large scale migration of Great Lakes populations to Red River (Peterson, 1985: 64). The breadth and empirical detail of Peterson's work provides us with some idea of the importance of geographical separateness, coupled with particular features of the Montréal-based trading system (which towards the latter part of the eighteenth century had coalesced into the North West Company), in the formation of distinctive mixed blood communities on the Great Lakes region. Moreover, her work, along with the expert report prepared by Ray (1998) for the *Powley* case, makes it clear that the Powleys' ancestral community cannot be understood in the context of a geographically circumscribed area but rather, included much of the Upper Great Lakes region. Likewise, Peterson is equally clear that these communities are in place prior to effective sovereignty. In fact, until the 1850s imperial policy was to actually discourage European settlement of the area.

> With the exception of Detroit, Kaskaskia and Cahokia, the French colonial administration established no farming communities in the Great Lakes region. After 1763, only partly in response to the regionwide resistance movement known as Pontiac's Rebellion, the British likewise discouraged settlement west of Lake Ontario. Desire to keep the peace and to monopolize the profits of the Great Lakes Indian trade were the overriding considerations favouring this policy. To have simultaneously encouraged an influx of white farmers would have upset both the diplomatic alliance with the native inhabitants inherited from the French and the ratio between humans and animals on the ground, straining the fur-bearing capacities of the region (Peterson, 1985: 40).

Peterson refers to the 'native inhabitants'; it is clear these communities were Native but whether were self-identifying Métis is another matter and is worth a brief detour to explain this issue more thoroughly. Nearly three centuries after these mixed blood communities sprang up, this ambivalence will continue to dog contemporary attempts to fashion a definition of Métis.

A question of identity...

If, as Paul Gilroy (2000) suggests, identity is a process of 'self making' through social interaction, one might expect a minimal condition of identity to include *self* identification. Indeed, along with community acceptance, self identification constitutes one of the two pillars of Métis identity formation forwarded by contemporary Métis politicians[32]. An important distinction exists, however, between who the Powleys' ancestors were and how we write about them today. Although we talk about historical 'Native' or 'Aboriginal' or even 'Indian' communities, few of the actual community members of these historical collectivities would have referred to themselves in those terms. These descriptions are contemporary shorthand descriptors; academics construct concepts (like 'Métis') to describe historically complex issues in an idiom amenable to contemporary academic conversation.

However, the reader may note that I have been careful not to use the term 'Métis' to describe the non-First Nation population residing in the Upper Great Lakes region, despite the fact that even the Powley lawyers' expert witnesses (Arthur Ray and Victor Lytwyn, both respected fur trade historians) do. The reason for this is that I cannot find a shred of evidence that the members of these historical communities self identified as Métis. As I explain in chapters five and six, the lawyers in *Powley* skirt this issue in their questioning of the expert witness, asking not whether these people would have identified as 'Métis' but whether they would have identified as 'Native', separate from First Nations.

Additionally, it should be noted that Peterson (1985) later backs away from her original conclusion (Peterson, 1978) that this era in the Great Lakes region was coterminous with the formation of self-conscious Métis identities. She suggests instead that "their distinctiveness was fully apparent to outsiders, if not to themselves" (1985: 39). Conversely, although he offers little evidence for his assertion, Foster (1985) argues that in these Great Lakes communities, 'eyes were still turned towards Montréal' – in other words, the collective lifestyles of these communities imitated, to a great extent, those of the French communities near Montréal (1985: 80). The question which should drive the answer to this question is a simple one; how would the Powleys' ancestors answered the question 'who are you'?

In one suggestive quote, Peterson (1985) relays a recorded conversation between a German naturalist (J. G. Kohl) and a 'mixed blood' voyageur, where Kohl asks him 'where do you live?' The voyageur replied:

> ou je reste? Je ne peux pas te le dire. Je suis Voyageur - je suis Chicot[33], Monsieur. Je reste partout. Mon grand-père était Voyageur: il est mort en voyage. Mon père était Voyageur: il est mort en voyage. Je mourrai aussi en voyage, et un autre chicot prendra ma place. Such is *our* course of life (1985: 64 – emphasis added).

If we assume his use of 'our' refers to something larger than his family, he obviously feels a sense of belonging to a larger collective. Whether 'voyageur' can be used as a

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[32] Moreover, both the Powleys' expert witnesses (fur trade historians) as well as all levels of the court justices (not to mention the provincial Crown) refer to the Powleys' ancestors as Métis.

[33] In this instance 'chicot' refers both to a small burnt stump, part of a farming technique used by mixed bloods living in the area and to the colour of his skin (a dark 'burnt' colour).

proxy for 'Métis' however, is a more complex issue: others might have self-identified as 'pork eaters' or even 'canoe makers' based on their position in the occupational hierarchy of the fur trade (minimal though it was). At the very least we can agree to the formation of a distinctive indigenous identity separate from both Euro-Canadian and First Nation. Historians are clear on this: the mixed blood communities possessed separate dress, a distinctive language and religion, a unique musical style, as well as a distinctive economic niche in the larger fur trade economy (see Peterson, 1985, 1978; Ray, 1998; this is also discussed further in chapter five).

These distinctive traits bear all the hallmarks of the later Métis identities coterminous with the creation of the Red River settlement. The crucial difference, however, is that Red River Métis self-identified as Métis and perhaps equally importantly, left numerous written documents to that effect. Thus, while I am not suggesting that mixed ancestry communities in the Upper Great Lakes *weren't* Métis, insufficient evidence exists to suggest the stability of such an identity. Moreover, casting back over history to pick out certain distinctive traits to construct contemporary descriptions of 'Métis' is a dangerous game to play, since these can be (and were) used by various interveners to construct 'cultural means' tests.

It may appear strange to present a description of the Upper Great Lakes mixed blood communities prior to developing the more conceptual discussion around discourse and representation which takes place next. This is deliberate. Colonialism marks the dividing line of legitimacy for both the legal and non-legal communities. Indeed, much of the discourse and representation about colonialism in Canada occurs some two centuries after the formation of mixed blood communities in the Upper Great Lakes. More importantly however, the bureaucratic categories formalized through the colonial undertakings relating to the surrender of 'Indian title' leave the strongest imprint upon contemporary Canadian society, both with respect to the use of 'mixed bloodedness' but also the reification of the categories of (then) 'citizen' and 'other', 'white' and 'Indian' through contemporary hybridity studies. I turn to this now.

PART II

The colonization of 'Métis'

The 'pre-colonial' as different

It is tempting to refer to these Great Lakes mixed ancestry communities as Métis, partly because it accords contemporary Métis political projects with a level of legitimacy that comes with pre-colonial occupation[34]. Indigenous critiques of colonialism, although growing in number, sophistication and subject area, remain anchored primarily in a comparison between pre-colonial life and the subsequent negative impact and trauma of colonialism. Experiencing colonialism's physical, cultural and demographic trauma and decrying its continued impact on indigenous populations ties together this field of critique (see Daes, 2000). 'The past' is used (in many cases appropriately) by scholars to morally bludgeon the contemporary state of things with respect to the Aboriginal population in Canadian society. It is (again, appropriately) positioned as a lens through which to understand contemporary relationships between Aboriginal communities and the Canadian nation-state. Like all history it contextualizes these present relationships and places them within larger structural trends ('colonialism'), as opposed to explaining them as the result of some innate racial defect which prevents 'Aboriginals' from partaking in the fruits of Canadian society.

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[34] The Métis National Council positions Métis origins in exactly this era: "The Métis people were born from the marriages of Cree, Ojibwa and Salteaux women, and the

For example, the fairly recently published and celebrated *Reclaiming Indigenous Voice and Vision* contains a collection of articles based on the results of the annual United Nations working Group on Indigenous Populations. In her introduction the editor Mary Battiste writes that

> [t]hrough our sharing, listening, feeling, and analyzing, we engaged in a critique of the trauma of colonialism. We examined the frameworks of meaning behind it, we acknowledged the destructiveness that it authorized, we imagined a postcolonial society that embraced and honoured our diversity (Battiste, 2000: xvii).

Battiste's quote underlies virtually all the research on contemporary discussions of colonialism and indigenous peoples. Likewise, her discussion of these traumatizing effects constitutes an enduring *episteme* for speaking and writing about contemporary indigenous communities. These are anchored in numerous descriptions of pre-colonized indigenous societies as healthy, vital and above all self-governing.

Thus, the representations of prior occupancy central to juridical determinations of indigenous authenticity also function as a barometer by researchers to measure the impact of colonialism. In extending Métis history back to the late seventeenth century as opposed to the mid-nineteenth century, the Métis National Council's historical narrative thus gains them nearly two centuries of legitimacy. Although such legitimacy is normally synonymous with pre-contact, the fact of the matter is that the earlier one can demonstrate a viable presence in a geographical territory, the better; particularly if it precedes the bureaucratic influence of British and (later) Canadian officialdom. In fact,

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French and Scottish fur traders, beginning in the mid-1600s" (http://www.Métisnation.ca/MNC/home.html - April, 2004).

the presence and vibrancy of pre-colonized societies as a crucial marker of 'the past' serves as the platform off of which virtually all contemporary indigenous claims are launched. The authors of the massive 5,000 page Royal Commission on Aboriginal Peoples (RCAP) argue that:

> ...it is impossible to make sense of the issues that trouble the relationship today without a clear understanding of the past. This is true whether we speak of the nature of Aboriginal self government in the Canadian federation, the renewal of treaty relationships, the challenges of revitalizing Aboriginal cultural identities, or the sharing of lands and resources. We simply cannot understand the depth of these issues or make sense of the current debate without a solid grasp of the shared history of Aboriginal and non-Aboriginal people on this continent (RCAP, 1996, vol. 1: 34).

So, despite odd parochial comments about '500 years of resistance' (see for example Hall, 2000), scholars generally construct colonialism as a 'post-sovereignty' issue. That is to say, colonialism is marked at the point (or more precisely, 'at these points', since colonialism was neither an empirically, geographically or temporally uniform process in Canada) when indigenous communities lost their ability to effectively struggle against European and Euro-Canadian wants, needs and desires. Georges Erasmus, the Dene leader and former co-chair of the Royal Commission on Aboriginal Peoples, elsewhere defines colonialism precisely in the context of this loss of indigenous governing power:

> [t]raditionally, we acted; today, we are acted upon. Our history since contact is the record of our struggle to act on our own terms. It is the record of our struggle to decide for ourselves as a people in the face of all the forces which have attempted to decide for us, define us and act for us (Erasmus, 1977: 177).

Early exploring, trading and adventuring in the new worlds gave way to administrators, bureaucrats, and other authorities who were fascinated with and often feverishly committed to bringing to bear the diverse relations of colonialist power that produced knowledge and practices about the 'colonial subject'. In this way, colonial authorities worked zealously to supplant existing indigenous decision making structures in an attempt to 'decide', 'define' and 'act' for indigenous people. Colonialism, in this sense, is predicated on a particular world view. It involves a 'general cultural sphere', a web of "political, ideological, economic and social practices" (Said, 1993: 9) that sets in place trajectories of intrusion, conquest, exploitation and domination (Thomas, 1994). Underlying these strategies were colonial officials' blithe self-assurance that what they were doing was not only right but *necessary* (in Canada, see, for example, Brown, 1985: 2-6; Dickason, 1985; Tobias, 1991).

> With the coming of the Europeans, our experiences as a people changed. We experienced relationships in which we were made to feel inferior. We were treated as incompetent to make decisions for ourselves. Europeans would treat us in such a way as to make us feel that they knew, better than we ourselves, what was good for us (Erasmus, 1977: 178; also see Cardinal, 1969).

Such hubris was not merely in the minds of Europeans, however; it was also sustained in power relationships constructed and later predicated on social and economic domination. Hence, "[w]e were no longer the actors – we were being acted upon. We were no longer naming the world – we were being named" (Erasmus, 1977: 178).

In a Métis context, Brown (1980) notes that these schemas began to resonate and reverberate in western Canada in the early nineteenth century. "The 1820s and 1830s…were conspicuous for the rise of racial categorization and discrimination and for the economic and sexual marginality of native-born sons and daughters to the new order" (1980: 205). In the context of the post 1821 merger between the Hudson's Bay Company and the Northwest fur trade companies, Brown suggests that considerations of economic recovery, in addition to the private prejudices of the Hudson's Bay Company governor

Sir George Simpson, conspired to block the career advancement of 'mixed bloods' (Brown, 1980: 206). Moreover, when the newly amalgamated Hudson's Bay Company began to draw up criteria for making determinations about the productiveness of current and possible future employees, race was used as a primary marker and explanation of probable failure (1980: 206). Ultimately, "the halfbreed label became a means of classifying the population hierarchically and occupationally" (1980: 207). Métis began their journey towards colonization and thus bureaucratic *difference*.

Now, difference is often constructed through binary oppositions and is said to represent a fundamental ontology of modernity (Hall, 1997). Many structural linguists argue that binary oppositions underlay the entirety of our language and thought and as such, there is nothing noteworthy about modernity's construction of these binary divisions. Derrida argues in fact that *difference* (or *différance*) is constitutive of language, and as such, is essential to meaning.

> [T]he movement of *différance*, as that which produces different things, that which differentiates, is the common root of all the oppositional concepts that mark our language…as a common root, *différance* is also the element of the *same*…in which these oppositions are announced…*différance* is also the production…of these differences… (Derrida, 1981: 9 – emphasis in original).

Derrida's argument is essentially that linguistic terms possess no meaning in and of themselves, that their meaning is produced through a contrast with other linguistic terms – black / white, primitive / modern; male / female, Métis / métis. Hence, the meaning of 'white' is produced in its contrast with 'black', primitive with modern, male with female, and Métis with métis. When read in a structuralist way (despite Derrida's warning against such reduction), these binary codes are understood as universal structures of culture (Bocock, 1995). They are, according to the French structuralist Claude Levi-Strauss, basic to the process of classification of all societies because they represent the 'keys' to unlocking the deeply embedded codes of cultural meaning. To wit, "…all classification proceeds by pairs of contrasts: classification only ceases when it is no longer possible to establish oppositions" (Levi-Strauss, 1963: 217).

To suggest that these binary divisions are a feature of modernity is to argue that the very idea of anthropomorphic classification is itself a distinctly modern proposition (Foucault, 1970). For example, in suggesting that "the principle underlying a classification can never be postulated in advance...[it] can only be discovered by ethnographic investigation, that is, by experience" Levi-Strauss (1963: 58) is invoking a specifically modern ontology. The idea that knowledge – through binary classification – is something that can and should be contained and produced by 'man' is, in a Foucauldian analysis, the result of a violent upheaval from classical to modern thought (Dreyfus & Rabinow, 1983: 27-28). "Once the order of the world was no longer god-given and representable in a table…the continuous relation which had placed man with the other beings of the world was broken. Man, who was once himself a being among others, now is a subject among objects" (Dreyfus & Rabinow, 1983: 28). Modernity places 'man' squarely at the centre of knowledge production, making possible the construction and confident articulation of social and cultural binaries of 'difference'.

Derrida (1981) reminds us that such binarisms are never neutral – the terms of the binarism are hierarchal, one 'dominant', one 'passive'. In other words, black/white, primitive/modern and female/male, to use a couple of our earlier examples, are more properly read as white/**black**, modern/**primitive,** male/**female,** nationalism/nationalisms and métis/**Métis**. For our purposes, this is important because the latter terms of the dyads are the aspects of sociality represented and perceived as *different*, as being outside the norm – white, modern, male, and métis represent normalcy, black, primitive, female, nationalisms and Métis represent difference, represent 'the other'. Thus, identifying binaries is always an act of social power (Hall, 1997).

> …[I]n classical philosophical opposition we are not dealing with the peaceful coexistence of a *vis-à-vis*, but rather a violent hierarchy. One of the two terms governs the other (axiologically, logically, etc.), or has the upper hand. To deconstruct the opposition, first of all, is to overturn the hierarchy at a given moment. To overlook this phase of overturning is to forget the conflictual and subordinating structure of opposition (Derrida, 1981: 41).

One might wish to argue that binaries of difference are a fundamental feature of language, such that colonialisms' categories are nothing special, *per se*, since their materiality is constituted in language and discourse. Stuart Hall uses this analytical framework more sociologically however, arguing that these divisions are imposed on certain social groups in the context of the inclusion and exclusion processes vital to modern identities (see Hall, 1997). That is to say, one need not swallow whole such early structuralist accounts which pay homage to "rules [that are] universal in character, or grounded in the structure of the mind" (Best & Kellner, 1991: 40). Rather, we may understand these divisions as "historically changing and specific to given discursive domains" (1991: 40-1). If we understand the productive tensions of modernity as a binary opposition between 'the west and the rest' (Hall, 1996: 184-227), it is clear that colonial administrators ('the West') attempted to impose these categorizations on the indigenous populations they encountered. Thus, 'the West' served as a discourse to pull together the disparate binarisms in existence prior to the political economy of its cultural and institutional expansion (Hall, 1996: 188).

More than a century of sustained colonial relations in Canada has left a legacy of racialized discourses which have congealed into a hardened bedrock of 'truths'. And while this is not simply (yet) another argument for 'blaming empire for everything', these truths play a powerful role in forming the contemporary context within which most Canadians who hold nothing more than a cursory knowledge about Aboriginal histories and communities draw their perceptions. This 'hardening' is, however, a relatively recent phenomenon in Canada, perhaps less than a century and a half old. I now discuss the colonial projects implicated in the production of racial and cultural differences that most contemporary Canadians take as self-evident truths.

The late nineteenth century colonization of 'Métis' in western Canada

The power in racialized discourses does not result from an acontextual or 'objective' validity, but rather in their claim to such. In other words, whether true or not the mere presence and weight of such discursive representations and stories in Canadian culture shape Canadian 'imaginations' in powerful ways, both in terms of how we view ourselves and how others see us. Racialized discourses are, in this sense, dominant ones and as with any discourses, part of their power rests on us incorporating them, fairly unquestioningly, into our cultural lexicon. They form the bedrock of meanings upon which contemporary Canadian identities are situated, and they represent the categories we use to make normative evaluations. Moreover, the power of racialized discourses lies not just in their use by the uninitiated, but by the extent to which even indigenous people attempting to resist are bound by the conceptual limitations of their language.

Foucault (1981) argues that discourses and the formation which give them intelligibility have the effect of constructing instituting a 'limited system of presences'. The important thing to remember about discourses and their 'rules of formation' is that few statements we make occur randomly; they operate according to particular rules which make them appear reasonable and intelligible, or conversely, outrageous or nonsensical. In this sense, discursive formations authorize certain statements and exclude or marginalize others – they limit the kinds of topics we speak about and how we speak about them. In the context of Aboriginality, this occurs in the context of narrowing the range and diversity of Aboriginal cultures to a few simplistic and easily memorable characteristics (Hall, 1997: 223-279). In the particular context of Aboriginal rights cases, it requires positioning Aboriginality as historically rooted.

Of course, the world is a complex place, and people are rarely one thing *or* (an)other. Part of the more recent literature in colonialism studies focuses on the extent to which identities during this era elided these neat categories of 'colonizer' and 'colonized'. In the context of Métis issues it is appropriate at this point to discuss this issue of '*hybridity*' because a singular point of anxiety about 'Métis' characterizes late nineteenth century government attempts to effect the surrender of Aboriginal title. Thus, I will discuss the issue of hybridity by situating it in a specifically Canadian historical context through a discussion of Canadian government officials' unease regarding their legal and bureaucratic relationships with Native communities. To a certain extent I am uncomfortable situating my empirical arguments in a context of hybridity not in spite of my focus on Métis issues but because of it. However, Métis-as-mixed is so ensconced in common parlance that failing to engage in at least a brief discussion about the relationship between the category Métis and hybridity is to leave out a vital element of how race continues to function as a discursive category in contemporary Canada vis-à-vis 'the Métis'. Before I enter the fray, however, let me stipulate two objections to conflating Métis with hybridity.

(1) If 'Métis' are mixed, 'First Nations' must not be: A dominant discourse regarding the ethnogenesis of Métis culture(s) is that they find their source in the blending of indigenous and non-indigenous cultures of fur traders and First Nations in the post-contact era. In other words, Métis identity is said to be a hybrid identity, an organic amalgamation of the best (or, depending on who you talk to, the worst[35]) of what various indigenous and non-indigenous cultures had to offer. This emphasis on hybridity is not erroneousness – on the face of it, it is true. The problem, rather, is why the hybridity of Métis in particular is seen as noteworthy at all, given that *all* contemporary Aboriginal cultures, communities and nations in Canada are the consequences of a blending of indigenous and non-indigenous cultures and even between different indigenous cultures themselves. Certainly, adjacent First Nations cultures and communities were no less susceptible than Métis to the intermixing resulting from the political economy of the fur trade. Yet the tacit assumption underlying much of the discussions around Métis-as-mixed identities is that First Nation indigeneity somehow remained pure while the indigeneity of the Métis is automatically rendered suspect, as though Métis are 'part' indigenous and 'part' something else. Or more precisely, 'First Nations' are 'mostly indigenous' and less so 'something else' while Métis are 'mostly something else' and less

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[35] Colonial administrators saved their most vitriolic ire for the 'half-breeds' who lived on or near reserves, who were perennially blamed for the sale of liquor in reserve communities (see Mawani, 2000).

so 'indigenous'. This suspicion is a direct result of the use of discourses of racial and cultural hybridity and is present in the Ontario Crown's (and allies') factums at both the Court of Appeal for Ontario and the Supreme Court.

(2) The marginalization of the role of history and historical trauma in the moral construction of contemporary Métis identities. A second issue arising from conflating Métis with hybridity is the appropriation of the term by individuals with 'mixed' ancestry who lack any genealogical connection to a historical Métis community. Although this conflation has bolstered the numbers of the 'Métis' census population of Canada (see Statistics Canada, 2003) and has garnered much positive attention from the Métis National Council, it was equally used by the provincial government of Ontario as a grounds to refuse negotiations with Métis political organizations, in particular the Métis Nation of Ontario and the Ontario Métis Aboriginal Association. Moreover, if of lesser immediate importance, many Métis who link themselves to a historical Métis community and nation find deeply offensive the use of the term Métis as a default category by those whose ancestors did not self-identify as such (the irony of this position is extrapolated below).

Having stated these two objections, both of which are positioned as critiques of the use of hybridity, let me foreclose on some epistemological untidiness. The substance of the argument I'm advancing here is that hybridity is and always has been both a social reality and an anxiety for colonial (and colonized) societies. However, the social fact of hybridity does not necessarily translate into its acknowledgement in dominant discourses. "Take any exercise in social mapping and it is hybrids that are missing. Take most models and arrangements of multiculturalism and it is hybrids that are not counted, not accommodated" (Nederveen Pieterse, 2002: 202). Nederveen Pieterse's wording is not exactly right, however; this is not an issue of our failure to acknowledge hybrids but rather, our failure to acknowledge their hybrid*ity*. After all, since most of us are hybrids of one kind or another, the possibility of failing to count or acknowledge hybrids is remote. The problem, instead, is a failure to acknowledge hybrids *as hybrids*. For Métis, ironically – particularly those who link themselves to the historic Métis Nation – the problem is the opposite. Métis are located as hybrids – with a full acknowledgement of their hybridity – precisely in a context where this identification denies that which they seek most, an acknowledgement of their legitimacy and 'wholeness'.

The problems (and, in an academic context, the utility) associated with hybrid identities stem(s) from their ability to disturb dominant discourses about the assumed essence of more stable categories. In this sense, hybridity is paradoxical: it is at once commonplace and disruptive, mundane and transgressive and it makes choppy the waters within which discourses of difference are moored. It calls to attention otherwise unstated essentialisms in that it "juxtapose[s] and fuse[s] objects, languages and signifying practices from different and normally separate domains and, by glorifying the natural carnality or 'matter out of place', challenge[s] an official, puritanical public order" (Werbner, 1997: 2). Hybridity is seen as both a source of self-loathing *and* desire, of degeneration *and* vigor. Yet hybridity also functions as a way-station between the racial essentialisms of the past and the supposed creative indeterminacy of the present and future. It both denies and reproduces racial essentialisms because we often take for granted the naturalness of the categories upon which the hybridity is situated. In the context of section 35 Aboriginal rights, these are articulated in the context of blood quantum and pre-contact origins.

As a trangression, hybridity muddies the usually placid and monological language of authority (Bhabha, 1994). It disrupts dominant codes, it exposes the 'gaps' and slippages between categories. To the extent that it unsettles abstractions and generalizations while encouraging induction over deduction, hybridity paradoxically demonstrates the futility of attempting to understand the colonial world through hard and fast boundaries while revealing the importance of these boundaries to how the colonial world was and remains comprehended (see Bhabha, 1994). Ultimately, however, hybridity – or what we focus on as evidence of hybridity – is important for what it says about the boundaries it is supposed to transgress. That is to say, if some differences matter (or threaten) and others do not, hybridity both works through and encourages reflexivity about which differences are transgressed. In short, hybridity and what counts as hybridity is in the eye of the beholder.

Here, my interest in hybridity is fairly narrow, although I think justifiably so. I am interested in presenting how hybridity was dealt with in 'colonial law' with respect to the category 'Métis'. Thus, the issue is not whether hybridity 'exists' – surely it does (or can) – but how the differences it belies are negotiated and in particular, the extent to which legislators were equipped to handle the discursive and material complexities spurred on by its acknowledgement during the latter part of the nineteenth century. As we will see below, hybridity caused a good deal of anxiety during the era of the extinguishment of First Nations and Métis Aboriginal title and the subsequent formation and placement of legislated 'Indian' communities. So much so in fact that *non*-racial signifiers were used to assist in making determinations when the ambiguity and uncertainty surrounding racial ones proved unhelpful, as they often did. Racial categorizations in nineteenth century Canada were, to use Paul Gilroy's more general argument, made difficult by "the body's refusal to disclose the required signs of absolute incompatibility we imagine to be located there" (Gilroy, 1997: 309).

Historically – and certainly by the latter part of the nineteenth century – Canada's construction of categories of indigeneity were horrendously ambiguous, made increasingly so by numerous legislative enactments and often based on spur-of-the-moment, ad hoc policies. These were fabricated by government officials (often during or after the fact) to deal with the detritus of a centuries-old fur trade political economy. As fur trade society retreated from the numerous villages dotting northern and western Canada, it left in its wake exceedingly complicated and by no means externally obvious categories of indigeneity.

For example, in 1901, Statistics Canada carried out Census Population estimates in the 'Green Lake and Unorganized Territories' in what is now northern Saskatchewan. By 1901, Statistics Canada had confidently divided humanity (or so it thought) into four mutually exclusive 'colours'; White, Red, Black and Yellow (Backhouse, 1999). This division required the creation of a fifth category, however, namely "persons of mixed white and red blood – commonly known as "breeds"" (Backhouse, 1999: 284, fn. 1). In one western Canadian Census, the different 'kinds' of breeds were further subdivided under 'Racial or Tribal Origin' (again, with no consensus, even among enumerators in the same district), into Cree Breeds, Cree French Breeds, Cree English Breeds, Chipewyan Breed, Chipewyan English Breed, Chipewyan Scotch Breed, English Breed, Salteaux Breed and Salteaux French Breed[36].

Whatever else one takes from this Census, it is clear that government officials were hopelessly entangled in pre-existing categories of race – predominately 'white' and 'red' – within which, nevertheless, they attempted to place 'mixed race' individuals through a process that was by no means uniform. In fact, although 'Métis' appeared as a Census category in 1885, by 1906 the category had slipped from the Census radar and over the next century 'half-breeds' were variously treated as Indian, white, 'other' and from time to time again as half-breeds (specifically the 1941 Census; see Goldman & Siggner, 1995). Importantly, the ambiguity and slippage between categories and / or their erasure all together was not confined to Census taking – rather, it was a more enduring feature of Canada's relationship with 'mixed blood' individuals and Métis communities (see Mawani, 2000).

That 'Indians' surrendered their Aboriginal title through treaties is fairly well known, as is their oppression under the various versions of the *Indian Act* (see RCAP, Vol. 1; Tobias, 1991). Conversely, the extinguishment of Métis Aboriginal title through the vagaries and injustices of the *scrip system* is less well known and, in any event, poorly understood. Although the complexities of this legal instrument are far beyond the scope of this chapter, Frank Tough's scholarship (1999; 1996; & Dorion, 1993) on the subject is valuable for his conclusions about the actual outcome[37] of the scrip system. More importantly, Tough challenges the perception that race by itself constituted an 'organizing grammar': "[r]acial, kinship...never seemed to be very useful for distinguishing between Indian and Métis" (Tough, 1996: 141). Likewise, other authors note that the eligibility criteria (i.e. racial distinctions) for applicants changed constantly in the thirteen scrip commissions that visited Métis communities in Red River and the Canadian Northwest (Tough, 1996: 118; Hatt, 1983; MAA *et al.*, 1981). Hatt, for example, argues that an entirely new group of people ('mixed bloods' born to one white and one Indian parent) became eligible for scrip even after the implementation of the *Manitoba Act* in 1870[38] (Hatt, 1983: 125).

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[36] I would like to thank Leanna Parker at the School of Native Studies, University of Alberta, for providing me with 'cleaned up', databased versions of these historical Census returns.

These changing criteria are indicative of dependency concerns rather than simply hardened or rigid racial hierarchies within which Native people were placed. For example, Tough notes numerous instances in which individuals who had originally signed into Treaty #5[39] later withdrew from treaty to take scrip; Reddenkopp & Bartko

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[37] Tough suggests that far from securing a stable land base for the Métis, the scrip process worked to divest Métis grantees of their birthright and to turn homestead lands, with their numerous restrictions, into commercial lands, free of restrictions (Tough, 1999: 62). This process hinged on the presence and agitation of scrip speculation syndicates that encouraged natives to take scrip rather than treaty, and who, through means both fraudulent and nefarious, created a speculative market through which they were able to secure for themselves a newfound source of wealth and property (Tough, 1996: 140-2).

[38] The *Manitoba Act* of 1870 was the legislative mechanism through which Manitoba entered Canadian confederation as a province. As per negotiations between the Métis settlers and Prime Minister Macdonald, 1.4 million acres of land were set aside for the 'children of halfbreed heads of family'; that it to say, those who were already born as of July 15th, 1870.

[39] The Canadian government used a series of numbered treaties between 1871 and 1921 to surrender the Aboriginal title of First Nations living in the region. Treaty #5 was negotiated in 1875 (with an adhesion in 1908).

(2000) note that more than one thousand people discharged from Treaty #8 in order to take scrip (2000: 214-5). Conversely, numerous cases exist in which Natives taking scrip later asked to return to treaty (Giraud, 1956: 6). Such withdrawals and additions were often monitored by concerned officials to ensure that those withdrawing from treaty had the means to support themselves, and would not become destitute, dependent upon government aid (Tough, 1996: 119). It is clear then, that government extinguishment of Aboriginal title, whether 'Indian' or 'Métis', was never solely (or even primarily) based on racial heritage. Instead, these decisions were based additionally on lifestyle, namely an ability to support oneself and one's family.

This is not to suggest, however, that blood quantum did not function as a differentiating characteristic for identifying 'Indians', only that it was not the only one nor originally, even the most important. The first legislative attempt by Canada to define 'Indians' in 1850 only included blood as one of several different qualifying factors. These included: anyone deemed Aboriginal by birth or blood; anyone reputed to belong to 'band of Indians'; *or* anyone married to an Indian or adopted by one. Later, in 1868, the issue of blood quantum played a more prominent role in that 'Indians' were defined as "all persons of Indian blood reputed to belong to the particular tribe, band or body of Indians"; all persons whose parents were Indians; all women married to these Indians. As of yet, no distinction is made between 'half-breeds' and 'Indians' – in fact, the government did not take specific steps to excluded 'half-breeds' from their legal definition of Indians until 1876: the 'half-breeds of Manitoba' who had accepted in the distribution of half-breed lands in Manitoba (as per the *Manitoba Act, 1870*) were

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ineligible for status as Indians, as were half-breeds who by that point had not already been entered into treaty[40].

Importantly, such legislated categories never worked as well on the ground as they did in the minds of colonial administrators. For example, although Euro-Canadian scrip commissioners initially took north their preconceived notions about which groups were which, their experiences with the Treaty #8/Scrip Commissions in 1899 Northern Alberta quickly dissuaded them of the notion of hard and fast differences between 'Indians' and 'Métis' (Reddenkopp & Bartko, 2000). Treaty #8 and other scenarios thus made for ambiguous policy, an ambiguity not merely the result of bureaucratic disorganization or confusion but instead reflecting the older and more fluid categories between 'Indian' and 'Native' that comprised the fur trade political economy (Tough, 1996: 119). Similarly, in his 1944 report, W.A. MacDonald (a government agent sent in to 'tidy up' Indian Band Lists[41]), noted that

> [i]n negotiating the various Indian treaties from time to time the aboriginal inhabitants of mixed blood were given the right to elect whether to take treaty or scrip. --- Mixed blood did not necessarily establish white status, nor did it bar an individual from admission into treaty. The *welfare* of the individual and his own desires in the matter were given due weight, no cast-iron rule was adopted (Hon. W. A. MacDonald, 1944 in Lang, 1978: preface – emphasis added).

Thus, Tough (1996; & Dorion, 1993) and Reddenkopp & Bartko (2000) observe that some Métis signed into Treaty, becoming legal 'Indians' and taking government provisions to feed their families; others simply denied their Métis background, taking on other ethnicities (French, for example) (Lagasse, 1958 in Sawchuk, 1978: 32). Most however, were "pushed out into the Hinterlands of their own Homeland, often being dubbed 'the road allowance people'" (Métis National Council Factum, 2000: 8; see Campbell, 1994), "driven back to the periphery of…settlements, liv[ing] miserably on the waste lands around them like so many nomadic groups without any definite occupation, and in poor looking huts which [were] often hidden amid rolling land[42]" (Giraud, 1956: 1-2).

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[40] The evolution of these early *Indian Act* definitions are taken from a pdf version of Indian and Northern Affairs (1978) *The Historical Development of the Indian Act*. Treaties and Historical Research Centre, PRE Group.

[41] Frank Tough, per. comm.

The Canadian state's differential extinguishment of Aboriginal title had a subsequently enormous impact on Native communities, well into the twentieth century. Using Alberta as an example, the provincial legislation which followed on the heels of earlier federal attempts led to the formation of new Native identities through the formation of Métis settlements in central and northern Alberta. These new identities were the result of wrangling between the provincial government and its opposition which eventually led to a parliamentary motion for an inquiry (the Ewing Commission) into the 'half-breed population'. Métis consciousness raising among the non-reserve Native communities, coupled with complex sets of competing interest groups including the politicization of these Native communities' destitution by Native leaders, the paternalism of the church, and the welfare interests of the Alberta government (Hatt, 1985: 75-6), led to the striking of the Ewing Commission in Alberta, and the eventual passing of the *Métis Settlements Act* in 1938 (Dobbin, 1981: 66-87).

What is particularly noteworthy about these struggles is that the 'Métis' of these eventual settlements were not 'Métis' as they might be defined in 1700 or 1885, but rather,

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[42] This was the experience of my *kokum's* (grandmother's) and mother's family.

> [t]he term "Métis" [came] to embrace more people than those who are descendants of the historic Red River society. Many Non-Status Indians along with Métis peoples are today members of organizations which represent [all] native people who are not Indians under the *Indian Act* (MAA *et. al.*, 1978: 46; also see Sawchuk, 1978).

Similarly, Dobbin (1981) notes that the 1930s Alberta movement focused on social and economic change rather than 'narrower' nationalism. It was broader, and its goals applied to all Native people outside of treaty (1981: 56). Malcolm Norris, a Métis Association of Alberta leader who appeared before the Ewing Commission, put the matter most succinctly, stating "[a]t the present time, the Métis is neither Indian nor white man, as I said before he is more or less an outcast, and he (the Indian) is far better treated than the Métis" (Norris, 1935 in Hatt, 1985: 74). Nevertheless, nearly a half century later in 1982, the Alberta Federation of Métis Settlement Association (AFMSA) expressed their 'distinct political, social, cultural and economic rights' by drawing a clear link to Louis Riel and the Red River Métis Nation (AFMSA, 1982). Although they "accept as Métis any person of mixed Indian and non-Indian ancestry who identifies as Métis" (AFMSA, 1982: 25), the historical justification they provide for their willingness to negotiate with the federal government was articulated as follows:

> Whether dealing with the Hudson's Bay Company under Cuthbert Grant or with the Government of Canada under Riel's Provisional Government, the Métis people have chosen to work within the system. Indeed, the birth of the Province of Manitoba exemplified our wish to fit into the existing political regime without sacrificing our rights in the process. Today we seek a distinct, not a separate, political status within Canadian federalism (AFMSA, 1982: 15).

Thus, throughout the early and middle parts of the twentieth century, the term 'Métis' (as used in the Alberta political climate) is indicative of a larger categorical change that signifies a shifting constituency. If the Red River Métis of the late nineteenth century were primarily Francophone- and Michif-speaking mixed bloods, the new Métis of the twentieth century could conceivably include anyone of Native ancestry lacking Indian status (see Sawchuk, 1978). Moreover, although the *Constitution Act of 1982* makes a fundamental *legal* distinction between three categories of Aboriginal people in Canada – Indian, Métis and Inuit – a more accurate categorization for understanding 'on the ground' Native socialization experiences during the early and middle part of the twentieth century must include a status/non-status, on-reserve/off-reserve categorization (see Dyck, 1980: 38). The *Indian Act* of 1876 and its subsequent revisions created a fundamental distinction between status Indians (who, considered wards of the state, lived on reserves), and those without who often lived as 'squatters' (i.e. living on land without legal entitlement to it). Dyck (1980: 38) points out that "[t]he impact of the reserve as a 'total' social institution on Indians' social and cultural organization was nothing short of enormous" (1980: 39).

If we understand nineteenth century Métis identity as formulated in the crucible of a fur trade – both in their initial economic niche, as well as the later nationalist expression in Red River – we can understand twentieth century Métis identity as formed in a different, yet no less totalizing, crucible of dependency and poverty, outside of the reserve experience. *This* is what it meant to be Métis in the early twentieth century. Not the thrill of the buffalo hunt or the hauling of furs and fur trade goods along the long waterways of the north, or even the long brigades of Red River carts transporting buffalo robes to the market in St. Paul, Minnesota. In the space of about two decades this nineteenth century reality was replaced by a new one, shared by both Métis and non-status Indians: the expansion of the Canadian state and with it grinding poverty, despondency, social fragmentation and economic and political marginalization.

The next and final section of this chapter discusses the contemporary positioning of the category 'Métis'. The first part is presented anecdotally to demonstrate the extent to which 'Métis-as-mixed' discourses still permeate persist in Canadian society, even among Aboriginal people ourselves. The second part will discuss the precipitous rise in Métis people in the Census (nearly 50%) in only five years. I will pay particular attention to the reasons provided by both the Métis National Council and Census Canada itself for this rise. Both are based in the idea that the term 'Métis' is itself a stable category to which people are beginning to flock. I will juxtapose this with the different, equally tenable explanation that the questions used in the Census itself impose a needless ambiguity on the Respondents.

PART III

Contemporary Ambiguities

Fall, 1990. When I was 17 years old, I left Saskatchewan to attend Queen's University in Kingston, Ontario. Except for a trip to visit family living in northern Alberta and another to attend a cousin's wedding in Minnesota, I had never been out of the province. More importantly, although I grew up in a city I had never lived in an area lacking a sizable Métis community. Kingston, Ontario was something of a shock. For the first time in my life, my Métis identity as a distinctive, legitimate identity had little meaning or legitimacy to other Native people. As a teenager I never emphasized nor even thought much about 'being Métis' – not because I was ashamed of it or unaware (I come from a very strong Métis family) but rather because I lived around many Métis and had so little meaningful contact with First Nations people, that it wasn't something I talked about; it was just something I *was*. And although as a teenager it was not an aspect of my 'self' that I particularly cared about (thinking reflexively about being 'different' did not constitute a large part of my reflections about the world; I was far more interested in football and hockey), it wasn't until I left Saskatchewan to attend university that I began to feel its importance.

This all changed in southern Ontario, however. I remember vividly one interaction with an older (supposedly) Native woman who I saw smoking on the steps of one of the university buildings. I thought 'finally! A brown face!' Well, she wasn't actually very brown and she didn't look particularly Native, but she was wearing a headband, braids, and turquoise jewelry, so I figured 'if it looks like a duck and quacks like a duck, maybe it's a duck'. I walked over and introduced myself and asked if she knew of any Native groups of campus. She blew smoke out of the side of her mouth, squinted at me through the haze and growled 'are you Indian?' To which I replied 'no, I'm Métis'. Her face immediately wrinkled into suspicion and she replied 'are you a blood or a breed?' Well. I was stuck. I wasn't a 'blood' (I don't think, anyway), and although I suppose by a certain racialized arithmetic I am 'half-breed' by virtue of my father being Danish and my mother Métis, I self-identified as Métis, not 'breed' (nor, for that matter, as Danish). However, she didn't look particularly susceptible to a lecture on the differences between a Métis and a 'breed', so I replied 'well, my mom's Native but my dad's Danish'. Her face lit up and she said 'aha! You're a breed! Oh, wait: Métis means breed anyway, doesn't it? Sorry about that.' She wiped a hand on her jeans, stuck it out and introduced herself. I (and my 'Métisness') had been neatly slotted into her understanding of the world and, although it appears I wasn't fully 'blood' (given her use of 'breed'), neither was I 'white'; I was someplace in between and in any case, deemed an ally.

Pauline's[43] abrasive personality aside, her categorization was hardly abnormal. In fact, it is typical of a broader understanding of Métis identities as an etymological category. For Métis, particularly those living outside western Canada in areas lacking stable Métis communities, talking to non-Native people about Métis as a specific culture is often met with eyebrows unfurling into puzzled glances; "I thought Métis meant mixed...?" Conversely, telling a 'full-blooded' First Nations person one is Métis can produce a more understated effect; a narrowing of the eyes or a slightly scrunched nose, subtly recoiling as though encountering something odious. Such deeply inscribed etymological understandings of 'Métis' are presented by First Nations and 'white' Canadians alike as loudly in body language as if they were to shout at the top of their lungs that, to borrow from Dumont's poem in the introduction of this chapter, 'they' are leather, and 'we' are naughahyde.

In much the same way a three year old will not take for granted what an adult will, an immediate question springs to mind: why the puzzlement and/or contempt? Equally importantly, why do I seem to understand and tacitly acquiesce to their confusion by feeling the need to explain myself? At this level, it is obvious that we are both caught up in the categories of race and in discourses of Métis-as-mixed. Insofar as this is true, there can be no doubt that race continues to play a deeply constitutive role in the processes of community and societal formation and in the persistence of hierarchies of race even among Aboriginal people ourselves.

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[43] A pseudonym.

That 'mixedness' (or 'blood quantum', to use American Indian vocabulary) circulates among Aboriginal people as a discourse of legitimacy is not all that surprising. Aboriginal people are no more transcendental than non-Aboriginals and thus, even though many are raised in communities which demonstrate the patent absurdity of simplified notions of blood quantum, we seem unable to shake off their persistent power. This is particularly relevant in the case at hand, since Steve and Roddy Powley are said to be 1/64th and 1/128th Aboriginal[44]. Indeed, in an American context Fogelson (1998), Mihesuah (1998), Hamil (2003) Krouse (1999) and Sturm (2002) demonstrate that blood quantum, although originating in colonialism, maintains a powerful hold over the discourses of legitimacy at play within indigenous communities. The issue, as articulated by Hamil (2003) is that often, what is

> [a]t stake…is tribal membership, along with the treaty rights and benefits, such as health care or shares of the proceeds of tribal enterprises, that come along with membership. … At a deeper and more significant level, however, the debate is about who is an Indian from the point of view of Indian people (2003: 268).

Likewise, the power of blood quantum as a legitimating discourse persists to such an extent that a Native scholar like Devon Mihesuah (1998) can suggest without a hint of a blush that 'real' Indian identities find their origins partially in blood, parentage and descent (1998: 213-15). In a similar way, Fogelson (1998) suggests that in addition to land and community, 'blood' (through descent) forms part of the bedrock of what it means to be Indian. Krouse (1999) discusses the particular importance of blood through kinship in the reclamation projects of 'mixed bloods' whose parents moved away from Native communities and into the city. Likewise, in her discussion of the relationship between blood quantum and cultural legitimacy among the Cherokee, Circe Storm suggests that "the association of racial mixing with cultural loss has so permeated the literature that some writers have gone so far as to ask whether or not there are "real Indians" [left]" (Storm, 2002: 18).

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[44] Or at least, such is the result of the racialized mathematics employed in the *Powley* case. According to genealogical records entered into court evidence and not contradicted by the Powleys' lawyers, they had one Aboriginal ancestor from somewhere in the mid nineteenth century who married out every generation since. Marginalized in this construction, however, is the legitimacy bestowed through self-identification and community acceptance. Would Steve Powleys' great grandfather been any less of a

In Canada, although blood quantum plays an important role in how Aboriginal identities are negotiated in different legal contexts, its baldness as a political discourse is somewhat blunted by virtue of being cloaked in bureaucratic double-speak produced through the *Indian Act*. For example, the *Indian Act* works largely through a blood quantum yet since we talk about being a 6(1) or 6(2)[45], its visibility (if not its effects) are reduced. Moreover, blood quantum remains a reality for many *Indian Act* bands where part of their community membership is based on a modified blood quantum test. All of this is to say that, despite ourselves, blood remains an important legitimating symbol in

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community member because of his 'one-half' blood quantum? Would this ancestor's son have been less for his 'one-quarter'?

[45] Categorization as a 6(1) or a 6(2) is based on whether both or just one of parents were eligible to receive (or possess) 'Indian status' under the *Indian Act*. Section 6(1) means both parents are eligible; 6(2) means just one parent is eligible. The math goes something like this: 6(1) + 6(1) (parents) = 6(1) (child); 6(1) + 6(2) = 6(1) (child); 6(2) + 6(2) = 6(1) (child); 6(1) + non-status = 6(2) (child); 6(2) + non-status = non-status (child). Thus, a status Indian marrying a non-status Indian over two subsequent generations leads to the loss of status for second generation child.

Native communities – especially for those who look 'suspicious'[46]. This relationship between 'blood' and belonging as an aspect of indigenous membership is explored in chapter six.

A question I sometimes get, after explaining I am Métis to someone who has a cursory knowledge about Métis history, is 'what kind of Métis are you?', to which I invariably reply 'what do you mean?', knowing full well what they mean. Usually, they reply with some variant of 'well, are you Cree Métis? Ojibway Métis? What is your Indian ancestry?' My kokum self-identifies as Métis, speaks fluent Cree and Michif (one of the numerous languages spoken by older, supposedly 'illiterate' Native people) but only broken English – she strongly self-identifies as Métis, as do I, as does my mother, etc. Yet, the implicit assumption in asking 'what kind' of Métis I am, even by the best-intentioned inquisitor, is that being Métis is somehow not 'enough'. In posing this question, a tacit (yet no less firm) presupposition anchors the questioner's racial categories; I am 'somewhere in between', not yet, or not quite, 'the other', yet not really 'Native' either. The power of race as a mechanism of ontological ordering is such that my legitimacy as a Native person is contingent not on the distinctiveness of my Métis culture, but as a part of something deeper, less ephemeral, more *real*.

Too numerous to count are the times that (presumably) well-meaning people have patiently attempted to explain to me that, although I self-identify as Métis, in actuality I am half Cree and half French; or that because my mother is Métis and my father Danish (whose 'Danish culture', for me, never went beyond my love of liverwurst and my disgust for pickled herring), I am really only a quarter breed, just like a 'full' Métis is really only half an Indian. In this equation, Métis are understood as 'mixed', as diluted missives of a deeper and more legitimate identity, namely that of our progenitor First Nation. These racial algorithms involve a peculiar calculus which is hard to break, an issue brought to the fore by the recent explosion of the Métis population in the Canadian Census.

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[46] This is even the case among Métis. I remember one interaction with a Métis person who was trying to explain to me that she was 'more Métis' because both her parents were

'Métis' in the Canadian Census

Between 1996 and 2001, the 'Métis' population in Canada grew by nearly half, from just over 200,000 in 1996 to nearly 300,000, only 5 years later, an increase of 43% (Statistics Canada, 2003). Explaining this precipitous rise by natural factors (such as child birth) would require Métis women to reproduce at a rate approaching ten times the national average, so we can assume this increase isn't solely the result of fertility rates. How then can this be explained? Statistics Canada argues that this increase results from an *increased awareness* of Métis issues arising out of court cases related to Métis rights, and constitutional discussions, and *better enumeration* of Métis communities. Indeed, Audrey Poitras, the Interim President of the Métis National Council (the 'national voice' of the Métis Homeland) states:

> We've always known that *our* population was not being fully recorded. These latest numbers are beginning to present a more realistic portrait of the Métis Nation in Canada. These statistics indicate how critical it is that the federal and provincial governments realize that Métis specific services and resources are needed across the [?] for the Métis people. The funds set aside for Aboriginal programs from existing resources simply need to be increased to reflect the reality of the Métis Nation…The census is documenting a boom in the Métis population *which reflects peoples' desire to self-identify as Métis*. There is a growing pride in

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Métis as opposed to just one of mine.

> the Métis Nation and that is reflected in those numbers (www.metisnation.ca – March, 2003 – emphasis added).

I want to suggest a third, equally powerful and equally likely reason for this enormous increase: the term 'Métis' has become an 'elastic' category, a default option for people searching for a 'positive' Aboriginal identity. Earlier I suggested that both academic discourse and everyday conversation have constructed Métis in two ways: those with 'mixed ancestry' which today would include most Aboriginal people in Canada, regardless of their legal categorization; a socio-political category referring to a historical group of people with distinctive language, institutions and land tenure. These are the Red River Métis and they carved out a distinct geographical territory. The Métis National Council refers to this latter group as those who reside within 'The Métis Homeland'. This is roughly the geographical region within which the Métis played a distinctive role in the sub-arctic fur trade and out of which the Red River Métis identities emerged. These are people who, the Métis National Council tells us, probably would have referred to themselves historically as Métis, and whose ancestors continue to refer to themselves today as Métis. Examining this issue geographically, the Census results have been grouped geographically (see figure one). This allows us to make some geographical sense – according to the boundaries of the Métis Homeland – of this huge increase.

	Census	Year		
Province	2001	1996	raw change	change %
NF	**5,480**	**4,555**	**925**	**20%**
NS	**3,135**	**825**	**2310**	**380%**
NB	**4,290**	**950**	**3340**	**450%**
ON	**48,345**	**21,530**	**26,815**	**125%**
MB	56,795	45,365	11,430	25%
SK	43,695	35,855	7840	22%
AB	66,055	49,470	16,585	34%
BC	**44,265**	**25,575**	**18,690**	**73%**

A close look at this table[47] demonstrates that Nova Scotia, New Brunswick, Ontario and British Columbia account for about 50,000 of the total increase in the numbers of Métis, or a little more than 50% of the overall increase. Yet much of these increases fall outside of the historical geographical boundaries of the historic Métis Nation. There are 'Métis' communities in the Great Lakes region of Ontario, but they largely dissipated in the 1850s. However, much of the increase in the 125% could conceivably be due to people re-identifying with these historical communities. Identifying precisely the reason for the increase requires a more in-depth geographical examination of the Census data, not one readily available to those without a statistical or data basing background.

In addition, part of the problem with interpreting these numbers comes from the questions used in the Census instrument. Question 18 on the 1996 and 2001 Census simply asks 'Is this person an Aboriginal person, that is, North American Indian, Métis or Inuit (Eskimo)?' There is no context for understanding how Census respondents define the term Métis; as is the problem with all questionnaires, they provide no context and thus, the respondent provides his/her own context. In such situations, 'Métis' holds the potential to become an acontextual, residual category for anyone of Native ancestry not linked to a particular First Nations band. While we might be tempted to suggest the solution of incorporating an additional question to the Census, to determine whether the person self identifying as Métis 'had ancestors who were then known as Métis or Half-breeds who resided in the Historic Métis Nation Homeland', this is not necessarily a useful strategy, either. Places like Saskatchewan, Alberta and the North West Territories have Native communities today whose ancestors would have fit into either category. In Treaty #6, #8, #9, #10 and #11 regions, fur trade communities held a fairly fluid sense of identity so that these hard and fast identity categories used today would not have made sense back them.

Summary

Today, the meaning(s) attached to 'Métis' in Canada continue to elude dominant, settled signification. Giokas & Chartrand (2002) suggest that any lingering ambiguity stems at least partly from the term's historical baggage, then referring, in addition to a nationhood definition, to: 1) mixed-ancestry people whose origins are located outside of the Métis Nation; and 2) mixed ancestry individuals who never possessed Indian status or who lost it through the myriad legal regulations used by the government to reduce the numbers of status Indians under its responsibility (2002: 85). Moreover, by 1880, none other than the Manitoba Lieutenant Governor Alexander Morris was already classifying Métis into multiple categories based on lifestyle: those owning houses and farming; those who were "entirely defined with the Indians, living with them and speaking their

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[47] The figures for the Yukon, North West Territories, Nunuvet, Prince Edward Island and Quebec have been omitted due to their negligible changes between 1996 and 2001.

language"; and those who made their living as buffalo hunters (Morris, 1991 [1880]: 294 in Giokas & Chartrand, 2002: 87).

Clearly, the historical calculus around the creation of legal 'Indian' communities remained hopelessly ensnared in colonial officials' inability to discern individual suitability merely based on racial blood quantum. Although the colonial and federal government created legislation to accomplish this task, the phenotypical and cultural diversity of 'mixed-bloodedness' repeatedly confounded such neat, categorical desires. Hence, colonial administrators' anxiety was as much about their inability to discern racial categorization as it was a straightforward worry about excluding non-whites from 'white' as though they were stable, pre-formed groups. Although the two anxieties are of course closely linked, the subsequent frustration caused many officials to simply throw up their hands and let indigenous people choose for themselves. Equally importantly, it takes a special kind of naiveté to assume that these indigenous individuals chose legal categories based on a firm correlation between their own self-identification and those of colonial strategies rather than basing it on local strategies for ensuring the survival of themselves and their families.

This chapter has explored the uneasy fit between the category 'Métis' and more established (though no more stable) categories of 'Indian' or 'white'. Both historically and contemporarily, the category 'Métis' has never fit comfortably into government policy for dealing with 'indigenous people'. Historically this caused anxiety around the surrender of Aboriginal title during the end of the nineteenth century and the destitution of non-reserve Native people during the early twentieth century. Today it persists as a problem for policy consideration especially with respect to the spectacular growth of

'Métis' in the Canadian Census. The new forms of identification which characterize urban Native communities will pose formidable challenges for the existing legal categories used in the juridical field. Chapter two sharpens our focus on juridical debate by critiquing existing theoretical frameworks of 'law' and offering a more methodologically sophisticated and empirically nuanced conceptual model of how 'law' operates.

CHAPTER TWO

FROM CONSTITUTIVE 'LAW' TO GENERATIVE COURTS: FISSURING 'LAW' AND POSITIONING THE COURTS AS A SOCIAL FIELD

INTRODUCTION

This chapter departs somewhat from the theoretical orthodoxy permeating the sociology of law landscape. Especially in pedagogical context, authors tend to draw a distinction between theories presupposing a societal consensus and those that mark society and social change as the result of deeply seated and enduring conflict. These theories are then divided into some combination of functionalist, liberal pluralist, instrumental & structural Marxist and feminist constructions of law and society (see for example Burtch, 1992; Caputo *et. al.*, 1989; Comack & Brickey, 1997; Vago & Nelson, 2003: ch. 1). While some have called for an end to the "exhausted and oversimplified" dichotomy between consensus and conflict (Burtch, 1992: 2), these and similar conceptualizations remain firmly anchored.

Embedded within these theoretical musings is an argument for the increasingly intensive impact of 'law' on our lives. Such *instrumentalist* perspectives present 'law' as a unified, monolithic entity and position it *externally* as an institution which impacts our lives in a myriad ways on a daily basis. Using this model, sociology of law scholars confidently articulate the relationship between 'law' and 'society' (positioned, incidentally, as ontologically discrete terms) as one in which:

> Law regulates prenuptial agreements, marriage, divorce, and the conduct of professors in the classroom. Law sets the speed limit and the length of school attendance. Laws control what we eat and where and what we buy and when, and how we use our computers. Laws regulate business, raise revenue, provide for redress when agreements are broken, and uphold social institutions, such as the family. Laws protect the prevailing legal and political systems by defining power relationships, thus establishing who is superordinate and who is subordinate in any given situation. Laws maintain the status quo and provide the impetus for change. Finally, laws, in particular criminal laws, not only protect private and public interests but also preserve order. There is no end to the ways in which the law has a momentous effect on our lives (Vago & Nelson, 2003: 1).

More recent sociological forays into 'law' have, however, moved away from a study of law conceived as a formal system of rules *a la* legislative law or judicial notions of *stare decisis*[48], towards a study of 'legality' more broadly conceived as a cultural artifact existing outside the specific edifice of legal rules/norms and formal legal institutions and within the cultural tapestry of society. "...[L]egal meaning is found and invented in the variety of locations and practices that comprise the domains of culture...those locations and practices are themselves encapsulated, though always incompletely, in legal forms, regulations and legal symbols" (Sarat & Kearns, 1998: 10). If instrumentalist studies of law focused on the study of rules and legal reasoning, the sensibilities underlying cultural critiques of law are based on an assumption that we should study everything about law *but* the rules (Abel, 1995: 1; also see Gordon, 1984).

These *legal consciousness* theories of 'law' are concerned with exposing what they perceive to be its overly institutionalized, overly homogenous and overly intrusive constructions. Law doesn't exist, as it were, outside of society – it is constitutive of society and exists 'within' it, while concomitantly social forms are themselves embodied within and produced through legal sensibilities and embodied in legal forms. Thus, constitutive theorists argue that the power of law and legality must be understood for the extent to which it has permeated society and for its place as a background norm which shapes in powerful ways how people constitute themselves, how they imagine their relationships with others and thus how their normative sensibilities are formed. That is to say, 'law' and legal consciousness serve as a mediating force between citizenry which constitutes particular forms of meaning-making activities between competing groups[49] (McCann, 1998: 79; also see Gordon, 1984).

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[48] *Stare decisis* is "a basic principle of the law whereby once a decision (a precedent) on a certain set of facts has been made, the courts will apply that decision in cases which subsequently come before it embodying the same set of facts". http://www.canadianlawsite.com/Dictionary_S.htm.

The problem with both instrumental and legal consciousness accounts is that they position 'law' as being nowhere or everywhere, respectively. That is to say, law is either captured tightly within legal rules and reasoning, or it is a dominant force in the very constitution of our beings as (for example) Canadian citizens. Rather than siding with either of these two constructions – i.e. choosing scarcity or plenitude – I attempt to bypass this debate altogether by fissuring 'law' itself. Using the work of Pierre Bourdieu this research demonstrates that, at least in Canada, what we normally talk about as 'law' is actually a series of domains of operation which function using distinctly separate logics requiring distinctly different technical competencies. Moreover, although rhetorically sharing an underlying commitment to the Canadian Constitution, these fields are (presently) in tension with one another and more importantly, are hierarchically positioned vis-à-vis their relationship to the broader political configurations of social power in Canadian society. In short, there is no such homogenous thing as 'law' and the extent to which we continue to use 'law' as a convenient shorthand for what are in fact quite different and often competing fields of operation is a testament to the persistence of its symbolic power as a unified edifice.

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[49] Legal consciousness theorists are thus (more) interested a decentered analysis of 'Law', in examining how we attribute meanings to it as a medium of consciousness-making and thus, in moving away from 'court-centred' analyses. Essentially, constitutive theorists argue that based on our location within the social body, we attribute different meaning to 'Law' and to court decisions. Although a fascinating topic, the timing of this dissertation (so close on the heels of the *Powley* decision itself) necessitates a focus on the court decision itself while confining itself (in chapter seven) to a more theoretical discussion of the broader impact of the *Powley* decision to date. An investigation of the meanings Métis attribute to legal decisions is, however, offered as a major avenue for future research.

Thus, the present research divides 'law' into a number of separate yet interlocking social fields (Bourdieu, 1990; 1987; Bourdieu & Wacquant, 1992; Swartz, 1997), with a specific focus on Canadian courts, due to their powerful position in the Canadian political field. In this context, courts are thus positioned as *specific, semi-autonomous,* and *generative* entities. That is to say *specific*, in that rather than study 'law' I study the specific domain of the courts and position them as entities possessing a distinctive mode of power in (as opposed to over) Canadian society; *semi-autonomous*, in that although swayed by broader societal discourses, the distinctive dynamics of courts presuppose and require a technical competency irreducible to the dynamics of other social fields; this competency gives the courts a certain level of autonomy. Finally, *generative*, in that the dynamism of court struggles produces discourses which, rather than directly constituting social relations, generate particular problematizations of social issues (discourses) which form the parameters within which political strategies and struggles ensue.

Certain sociology of law traditions are particularly useful in my formulation to the extent that their analysis is anchored in a 'constitutive' court (critical legal studies and critical race theory) and emphasize the symbolic power of 'law' as a 'truth claim' (Foucauldian discussions of law) and as a privileged site of knowledge production. Each of these theoretical traditions argue, with varying degrees of explicitness, that courts play an important role in how social inequality is reproduced in supposedly liberal democratic societies[50]. Despite their utility in this context, these legal traditions are limited insofar as they understand and construct 'law' as an institution used to structure and maintain the privilege of certain groups (i.e. based on patriarchal, racial and/or class inequality).

As such, these traditions minimize two issues which are of specific importance for analyzing the use of courts by Aboriginal litigant communities in a Canadian context. First, they fail to respect the tension between the courts and provincial and federal governments in the creation of Aboriginal policy. With respect to Aboriginal communities, governments are rarely more generous than courts mandate them to be. While most Aboriginal communities prefer to negotiate policy or legislation to litigating, negotiations usually occur only when courts force it. This marks a crucial line of tension between courts and government. Second, they fail to pay sufficient attention to the struggles that ensue *within* the courts themselves. Regarding the latter flaw, both critical legal studies and critical race theory operate on the tacit assumption that courts mirror broader relations of social inequality and thus, that they reproduce and constitute them. In these models courts struggle too little and produce too much. My conceptualization positions court decisions at the intersection of non-juridical social relations and internal court struggles. Importantly, these struggles require that we not limit our analysis to the court decisions themselves but rather, investigate more deeply the court documents framing their limits.

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[50] Bear in mind, however, that Foucault's own understanding of the position of courts stripped them of their agency and turned them into vessels for punishment and cure using the newfound expertise of human sciences.

Understanding courts as a social field requires that we accord them an indirectly generative (as opposed to directly constitutive) function. It also requires that we position them as possessing a distinctive history and logic that impose a particular form of legal reasoning on their hierarchies, struggles and boundaries. The methodological consequence of this positioning is that we cannot examine judicial decisions in isolation of the larger corpus of court documents that shape their parameters. Judicial decisions need to be understood as the culmination of struggles internal to the judicial field and not simply as 'pre-determined' results of some larger structural imperative (i.e. racism, patriarchy, material inequality, etc.), nor the legal positivist pretensions of applying the correct legal principles to a given set of facts. When judges author court decisions, they do not write them on whole clothe; these decisions mark terrain already muddied by past legal battles and contain the detritus of past struggle and moreover, although not constrained not by 'legal reasoning', these decisions are shaped by *judicial sensibilities*.

This chapter contains two parts. The first part discusses what are referred to in the present research as *constitutive* conceptions of courts[51]. This comprises a bulk of the chapter, and positions the courts as both political, racialized and knowledge producing entities by situating my argument in the context of three theoretical traditions: *critical* *legal studies, critical race theory* and *discursive theories of law*. The critical legal studies movement – or at least, the North American facet – is particularly useful insofar as these scholars set their sights on revealing the deeply political character of the American courts. Their specific focus on critiquing the 'legal consciousness' buoyed through an over-reliance on legal doctrine – i.e. court cases – is a step in the right direction. But, although the field of critical legal studies is helpful in dismantling such hegemonic liberal conceptions, it lacks anything like a sustained analysis of racism and the effects of racialized stereotypes of Aboriginality in judicial decision-making. Likewise, it tends to hold a view of law as essentially oppressive rather then emphasizing it as a site for struggle which is neither inherently progressive nor oppressive.

Conversely, while critical race theory continues the critical legal studies' critique of liberal conceptions of 'law', it focuses on the issue of race in contemporary court decisions. Moreover, it emphasizes the fact that courts hold the ability to be both oppressive and emancipatory; it is a matter of struggle and, of course, social positioning at a particular moment in time. Likewise, Foucauldian based discussions of law echo some of the constitutive sensibilities found in critical race theorizations. This latter tradition – found particularly in certain strains of feminist and gay/lesbian critiques of law – demonstrate the extent to which 'law' generates certain modes of knowledge while marginalizing others. I pursue this idea of 'knowledge production' in the specific context of a court case to demonstrate that, if court *decisions* can be understood as nodes of

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[51] Although these legal traditions talk about 'Law', their critiques focus exclusively on the courts. In this context, 'constitutive' refers to the idea that 'Law' is externally positioned yet forms the very objects it is said in liberal theories to preside over.

knowledge production, court *cases* (with their various legal actors and evidence) equally demonstrate the limitations of this production.

The second section of the chapter frames the courts as a social field. It begins with a brief discussion of the character of social fields and then delineates specific features of a *juridical* field. This conception of the courts, although demonstrating insights of both critical legal studies and critical race theory, differs in two important ways. First, conceiving and positioning the courts as a social field requires stepping back from one of the bolder claims of both critical legal and critical race theory, that courts directly *constitute* social relations rather than merely reflecting and presiding over them. Here, we argue that courts are not constitutive but rather, generative. That is to say, instead of directly constituting social relations, they generate juridical discourses. The most powerful of these discourses come through the court decisions and are used to create policy. Insofar as this is the case, it immediately renders problematic the assumption of a direct relationship between court decisions and 'social relations'. In short, my point is that although Canadian courts are powerful entities, we need to stop assuming that because courts decree the rearrangement (or hardening) of existing social relations through court decisions that this automatically occurs. More on this below.

Second, situating the courts as a social field requires a more nuanced discussion of how judges make decisions. Rather than 'following rules', judicial decisions are the result of embodied understandings (Bourdieu, 1992; Fish, 1988; Taylor, 1995) which create a kind of *judicial sensibility*. The latter formulation allows me to make specific use of critical legal studies' sensibilities about the role played by indeterminacy in judicial decision-making without forcing me into the position (taken by many critical legal theorists) that because they (judicial decision-makers) lack complete determinacy, judicial decisions must be completely *in*determinate. This is crucial for understanding how we can rescue a mode of legal reasoning still able to account for the presence of motivating discourses besides those contained in legal precedent. Importantly, these non-precedential discourses contain within them the residual tensions of colonialism. Moreover, they shape judicial decisions in important but (and this is crucial) indirect ways, a discussion carried out more fully in chapter three. We now turn to a discussion of constitutive theories of law.

PART I

Constitutive Law

Constitutive theories of law accord a powerful role to 'law' in the constitution of social relations and in particular, to the courts. Three streams of thought regarding the relationship between 'law' and politics may be constructed using constitutive theories of 'law' – these are critical legal, critical race and discursive constructions. The following section deals with these schools of thought in further detail.

Critical Legal Studies

Strongly influenced by Marx and Marxian sensibilities, critical legal studies scholars (self-described as "crits") deny a distinction between 'law' and politics. In doing so, they dismiss liberal contentions which strive to differentiate 'legal' from 'political' thinking and the determinacy of legal reasoning from the indeterminacy of political jousts (see Williams, 1987). In this sense, critical legal scholars critique the fetishism of 'law' (i.e. courts) as primarily a technical rather than moral and political institution. Kairys

(1990), in his introduction to a major critical legal theory text, argues that liberal depictions of 'law' present it

> as separate from – and "above" – politics, economics, culture, and the values or preferences of judges. This separation is supposedly accomplished and ensured by a number of perceived attributes of the decision-making process, including judicial subservience to a Constitution, statutes, and precedent; the quasi-scientific nature of legal analysis; and the technical expertise of judges and lawyers (Kairys, 1990: 1).

Of all the critical legal studies critiques of liberal conceptions of 'law', most excoriated is the idea that it can be understood as a determinate, apolitical system of rules and results. For crits, the public perception of this idealized understanding of 'law' serves as a cloak to veil (what they view as) the otherwise naked political choices engaged in by judges at all levels. In this sense, critical legal theorists attack the notion that 'law' and legal reasoning are determinate or pre-ordained. Instead, they argue that 'law' – jurisprudence in particular – is marked by its *in*determinacy (Hutchinson, 1995; Klare, 1990). Judicial cases and precedent are vague, ambiguous and even conflicting, such that judicial decisions require rather than obviate the need for judges to make moral and political choices about the rules and cases they use to render decisions. To wit, "legal rules and decisions are contingent and conventional – they are products of human choice. There is always room for discretion, sometimes more, sometimes less, in applying the rules to cases" (Klare, 1990: 65). This issue of discretion, discussed in further detail below, is important for understanding the judicial application of legal principles.

Finally, the crit attack on legal liberalism is anchored not just in a critique of its logical consistency but in a wholesale criticism of contemporary liberal democratic societies – in particular that of the United States – and the role of the courts in them. For crits, American society is characterized by a 'gangsterism of the spirit', by hopelessness and a lack of local control over decision-making institutions which affect their lives in meaningful ways (Hutchinson, 1995; Kairys, 1990: 5). The judicial system is strongly implicated in this domination and oppression of human agency because it sublimates broader democratic impulses to supposedly narrow and technocratically judicial ones. In particular, contemporary jurisprudence mystifies and oppresses because it "masks the existence of social conflict and oppression with ideological myths about its objectivity and neutrality" (Kairys, 1990: 6).

This idea of 'masking' is a familiar one to Marxists and represents a major strut in the crit platform off which they attack liberal ideologies as just that – ideology. To the extent that broad sectors of society buy into the legitimacy of the legal system, crits suggest that we stabilize a system that both degrades and oppresses us. "Legal equality functions to mask and occlude class differences and social inequalities, contributing to a "declassification" of politics which militates against the formation of the class consciousness necessary to the creation of a substantively more equal society" (Balbus, 1978: 79). The persistent power of this false consciousness requires that we accept several abstractions, in particular the notion of the modern disembodied individual and a sustained distinction between civil and political society. Likewise, the notion of false consciousness is tied strongly to critical legal scholars' mistrust of liberal promises of fairness and meritocracy and buttresses their formulation of ideology. In this context, they save their most wincing criticisms for civil rights decisions where they relegate the odd victories as exceptions that prove the rule.

Importantly, to argue that courts possess the ability to 'mask' oppression is to imbue them with a *constitutive* power. That is to say, although liberal legalists seem myopic on the relationship between 'law' and inequality, critical legal theorists charge that court decisions impact power relations in broader society in ways that privilege certain groups and marginalize others. "[T]he law is not simply an armed receptacle for values and priorities determined elsewhere; it is part of a complex social totality in which it constitutes as well as is constituted, shapes as well as is shaped" (Kairys, 1990: 6). This emphasis marks an important step in the thinking of legal scholarship because it destabilizes conventional liberal legal and jurisprudential narratives about the obviousness or necessity of contemporary societal arrangements and the neutral 'umpire' role of the courts in arranging them. Likewise, it demonstrates that 'law' is both a product and an engine of substantive social inequality and hierarchy. This constitutive attribute of critical legal theories of 'law' is sharpened in section two.

In as much as crits view the judicial system with suspicion if not outright hostility, they attack one of its founding idioms, *rights*, and perhaps equally importantly, rights consciousness. Crit sentiments are linked to earlier Marxist invocations – so clear in Kairys' critique of legal liberalism – such that they share Marx's contempt for individual rights.

> It is a curious thing that a people [who are] just beginning to free itself, to tear down all the barriers between the different sections of the people and to found a political community, that such a people should solemnly proclaim the rights of egoistic man, separated from his fellow men and from the community (Marx, 1974: 230).

Marx's critique of rights is based on their link to a modern bourgeois state that rhetorically separates the public and private, such that the formerly linked civil and political spheres come to be seen as distinctively separate spheres. In such circumstances, the aspects of life most in need of the protection of rights were suddenly outside their protective ambit. In this sense, rights formed (and remain) a "major part of the cultural capital that capitalism's culture has given us" (Tushnet, 1984: 1363).

The sentiments of Tushnet's (1984) seminal critical legal theory critique of rights are based firmly in Marxian inspired critiques of the mystifying and bourgeois nature of rights, referred to dismissively by Marx as the 'so-called' rights of man (see Marx, 1974; Bartholomew & Hunt, 1990). In fact, Tushnet (1984) critiques liberal rights on four grounds: their instability; their indeterminacy; their abstracting reification; and their political unproductiveness[52]. He argues that rights are *unstable* because they are relative; "rights become identified with particular cultures and are relativized" (1984: 1365). They are *indeterminate* because they can be invoked by all parties involved in a dispute, thus offering no particular advantage in political struggle; "the language of rights is so open and indeterminate that opposing parties can use the same language to express their positions (1984: 1371). Rights are *reified* because they falsely abstract from the lived reality of the experience when they characterize it as a right; "The language of rights should be abandoned to the very great extent that it takes as a goal the realization of the reified abstraction "rights" rather than the experiences of solidarity and individuality" (1984: 1382-3). Finally, rights are politically unhelpful; not only unhelpful, in fact, but harmful, since they privilege the wealthy and tend to emphasize negative rather than positive rights (Bartholomew & Hunt, 1990: 18).

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[52] See Bartholomew & Hunt (1990) for an excellent analysis and critique of Tushnet's construction of rights.

Tushnet's (1984) critique of rights is singled out not because it represents a core argumentative trajectory of critical legal theory; in fact, Bartholomew & Hunt (1990) argue that Tushnet's thinking represents only one of several distinct theoretical strands in critical legal studies. For our purposes, however, Tushnet's work is revealing because *critical race theory* critiques focus precisely on critical legal theory critiques of rights as unstable, indeterminate, alienating and politically harmful. The next section will canvass some of the major proponents of critical race studies.

Critical Race Theory

> Critical race theorists have not placed their faith in neutral procedures and the substantive doctrines of formal equality; rather, critical race theorists assert that both the procedures and the substance of American law, including American antidiscrimination law, are structured to maintain white privilege. Neutrality and objectivity are not just unattainable ideals, they are harmful fictions that obscure the normative supremacy of whiteness in American law and society (Valdes *et. al.*, 2002: 1).

Although partly rooted in critical legal studies, the critical race theory movement grew out of a consensus not only about the failure of critical legal studies to acknowledge the role of race and racism in the oppression of 'people of colour', but also a misapprehension of the potentially transformative power of rights and piecemeal reform for minorities (Delgado, 1987; Williams, 1987). While critical race theory is not necessarily characterized by a linear theoretical trajectory, a number of early writings form the core of its theoretical musings. These include Crenshaw (1988), Delgado (1987), Matsuda (1987), Lawrence (1987), P. Williams (1991) and (to a lesser extent) R. Williams (1987). Delgado's (1987) analysis in particular of the fundamental, interrelated problems with critical legal studies thinking with respect to minorities offers a clear exposition of the denser writings of the critical race theorists mentioned above. Three of

Delgado's critiques are relevant here: 1) their under-appreciation for the importance of legal structures and rights for minorities; 2) their concomitant rejection of incremental social change; and 3) their paternalistic use of false consciousness. Most critical race theory theorists echo these critiques in form and nuance.

Taking the critiques last to first, various critical race theorists argue that critiquing minorities for their failure to recognize the innately oppressive character of 'law' (i.e. false consciousness) is paternalistic and lacks anything like an adequate understanding about why and how minorities use 'law'. The very myths upon which 'law' is founded – equality, justice and the pursuit of happiness – are responsible for their persistence as powerful tools of progressive social change (Williams, 1987: 121). Likewise, critical race theorists critique critical legal ideas about the persistence of minority subordination as resulting from the "uncritical absorption of self-defeating ideologies" (Delgado, 1987: 311). They argue instead that more coercive forms of domination, such as the exclusion of minorities from the myriad social networks so crucial in contemporary societies to attaining social capital, play an important role in minority marginalization. "[Non-white] lawyers need…no reminder that the Constitution is merely a piece of paper in the face of the monopoly on violence and capital possessed by those who tend to keep things just the way they are" (Matsuda, 1987: 338). Matsuda's argument is in fact that most minorities possess a 'dual consciousness', such that they can simultaneously live in both the promise and practical, oppressive reality of 'Law' (1987: 338)[53].

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[53] In his sharply worded critique, Robert Williams argues that critical legal studies critiques of legal rights are particularly galling because "beneath [the] ground [of piecemeal reform] lie buried our own martyrs, combatants for a terrain that people of color are now told may have been nothing more than the chimerical construct of a mystified consciousness" (Williams, 1987: 121).

A second critical race critique of critical legal studies focuses on their objection to piecemeal change. Their objections are two-fold. First, critical legal studies theorists argue that incremental change does little more than postpone the society-wide change necessary for the creation of a just society. Second, piecemeal change – small or single court victories, for example – function to mask the larger structural problems with 'the system'. A rejection of piecemeal change is closely aligned with the false consciousness argument – minorities are paternally advised that they misinterpret court victories when they view them as such. Delgado suggests that critical legal studies scholars' rejection of piecemeal reform misrecognizes their interpretation by minority scholars and community leaders, but more importantly demonstrates the degree to which the privileged position of most critical legal studies scholars puts them out of touch with the lived experiences of many minorities.

> A court order directing a housing authority to disburse funds for heating in subsidized housing may postpone the revolution, or it may not. In the meantime, the order keeps a number of poor families warm. This may mean more to them than it does to a comfortable academic working in a warm office (Delgado, 1987: 309).

The third and most emphasized element of critical legal studies, however, is their dismissal of the power of legal rights. This is a particularly salient critique in the context of Métis rights, since court constructions of these rights currently hold the most currency in Métis political organizations' fights for justice. As noted earlier in the Marx quote and Tushnet's criticism, however, the critical legal studies movement seems to write off the advantages and optimism of a language of rights. This is part and parcel of their larger emphasis on *informalism*, which "criticize[s] formal structures such as rights, rules and bureaucracies, while opting for consciously informal processes that rely on goodwill, intersubjective understanding and community" (Delgado, 1987: 314-5). The critical race theorist movement is most eloquent in their dismantling of critical legal studies dismissals of rights and the protection of 'law' they contain.

Perhaps the most powerful of these critiques comes from the critical race scholar Patricia Williams (1991). Williams relates a story in which she and Peter Gabel – a founder of American critical legal studies – were hired to co-teach a law course at a New York University. Both recent arrivals to New York, the two are forced to search for residences at the start of the semester. The starkly different processes undertaken in this pursuit is used by Williams to point out the differential impact of 'law' on subjects located in different racial (and gender) positions within the social body. Moreover, insofar as their different locations within the social body (he as a white male, she as a black female) leads them to make use of 'law' in very different ways, it goes to the heart of the critical race theorists' critique of critical legal studies' dismissal of rights.

Williams tells us that in Gabel's search, he meets a couple from whom he receives 'good vibes'. On the basis of those vibes, he leaves cash deposit of nearly $1000, without a receipt. Williams tells us that Gabel's reason for forgoing any formalities was his wish to avoid imposing an artificial formality and distance on his relationship with the landlords. He felt a formal invocation of law through the lease would just 'get in the way' of what was otherwise a close and *real* relationship. He and his potential landlords set a time to meet and sure enough, they show up, keys in hand, to let him into the apartment. Williams is stunned by what she sees as the recklessness of his dealings. "There was absolutely nothing in my experience [with law] to prepare me for such a happy ending" (1991: 146).

Conversely, after finding an apartment, Williams insists on a formal, arm's-length contract, making sure to dot all the i's and cross all the t's. She insists on this formalism, despite the fact that her eventual apartment of residence is located in a building owned by friends. For Williams, trustworthiness and good faith can only be established through an invocation of law's formality, rather than its avoidance. Her reasons for this are, she tells us, historical: "I remain convinced that, even if I were of a mind to trust a lessor with this degree of formality, things would not have worked out so successfully for me: many Manhattan lessors would not have trusted a black person enough to let me in the door in the first place…" (Williams, 1991: 146-7).

Gabel sought to demonstrate his good will and trustworthiness by 'going with the flow' and running off the good vibes while by invoking 'law's' formality, Williams sought to do the same by leaving as little as possible to chance. Even as Gabel attempted to mitigate his 'power potential' and authority by impressing an informality on the relationship, for Williams, this was neither possible nor desirable. "As black, I have been given by this society a strong sense of myself as already too familiar, personal, subordinate to white people…I grew up in a neighbourhood where landlords would not sign leases with their poor black tenets, and demanded that rent be paid in cash" (1991: 147). Thus, for Williams informality was symbolic not of trust but *dis*trust (1991: 148).

Williams' initial shock at Gabel's transaction is indicative of critical race theorists' discomfort with the dismissal of 'law' and rights characteristic of critical legal theory. This discomfort lies in what critical legal theorists take for granted that most minorities cannot about their place or position in society and their prior experiences with 'law'. In particular, critical race theorists criticize critical legal theorists' lack of appreciation for the extent to which rights have proved crucially important bulwarks in the often agonizingly slow struggle for social progress, while a historical *lack* of rights has done little to progress minority agendas (Williams, 1987).

Delgado suggests three problems with doing away with rights. First, critical legal studies scholars appear to dismiss the fact that, given the structure of American society, rights *do* check social inequality. Similar to their critique of crit false consciousness arguments, critical race theorists argue that one need not swallow whole the idea of rights as an unqualified good in order to value their pragmatic utility. In point of fact rights act not just as entitlements; they function to define the legal boundaries between citizens and between citizen and state. To this extent, they are neither unqualifiedly good or bad. They are useful – or not – in a given historical and social context. Within a contemporary context, they are as likely to slow perpetrators as victims of racial subordination (Delgado, 1987: 305). As we will see in chapter seven the position of the courts in contemporary Canadian society makes the expression of social grievances in the idiom of rights potentially transformative.

The second problem with critical legal studies' dismissal of rights is that they lack a replacement to check structural racism. Critical legal studies theorists, usually politically aligned with the broader 'Left' movement, have yet "to respond to the most sustained criticism leveled at the socialist project, namely, that socialism is inescapably authoritarian" (Bartholomew & Hunt, 1990: 3). For critical legal scholars, the future ("Utopia") consists of non-hierarchical, mixed race communities characterized by decentralized decision-making, locally constructed and constantly renegotiated rules and regulations and above all, equality (Hutchinson & Monahan, 1984: 230). In such a place, there is no need for rights, as everything would already be shared equally (Delgado, 1987: 313).

The problem with this Utopia, even aside from its idealism, is the fact that critical legal theorists fail to account for how minority citizens currently living under the burden of racism would somehow find an equal place in the future. That is to say, there is nothing to explain how, hypotheticals aside, these non-hierarchical, egalitarian communities would arise. Additionally, even if we were to agree that such a community could exist, there is nothing to prevent racism from resurfacing in its folds. If this were to occur without structural impediments to check such behaviour, minorities would be back where they started, only this time lacking even the basic safeguards currently possessed. Critical legal studies scholars'

> focus on delegitimating rights rhetoric seems to suggest that, once rights rhetoric has been discarded, there exists a more productive strategy for change, one which does not reinforce existing patterns of domination. Unfortunately, no such strategy has yet been articulated, and it is difficult to imagine that racial minorities will ever be able to discover one (Crenshaw, 1988: 1366).

The third and final critical race theory critique of critical legal theorists stems from the latter movement's suggestion that rights function to slice and dice communities into rigid, atomistic, rights-bearing subjects – a sentiment expressed by Gabel in Williams' earlier narrative – at the cost of our collective human potential. For 'racial' minorities and other disadvantaged groups, however, rights often exert the opposite effect – rather than separating, rights bring them together. In the present research, rights in fact function as a key hub in aligning a fairly diverse set of Aboriginal communities to a common pursuit of converging interests (in this case hunting for food). A crucial feature of rights claims in Canada is thus that they represent "the sole proven vehicle of European-derived legal tradition capable of *mobilizing* peoples of color as well as their allies in the majority society" (Williams, 1987: 121 – emphasis added). In addition, the mobilizing power of rights is well known to feminist scholars, such that rights and rights discourses articulate group experiences in a manner that allow individuals to draw on the collectivity for strength (see for example Razak, 1991). In the context of diverse sets of Métis communities, the juridicalization of their political strategy has worked to displace other concerns but more importantly, has provided a common source of outrage for many who self identify as Métis.

In a nutshell, critical race theory sentiments suggest that although we should take seriously Borrows' (1997: 171) worry that '...the benefits conferred by 'rights' [may] displace more meaningful reform and come in the place of wider liberation', we need to be equally attentive to his observation that "we cannot, however, ignore the world we live in...It is true that something gets lost in the translation, but what else do we have?" (1997: 171) While not without their drawbacks, rights are thus important because they provide formalized and codified 'checks' that restrict the discretion of more powerful actors who control a majority of material and organizational resources (McCann, 1998: 95). In this way, rights offer a solution to the problem encountered by many minorities, namely, that of "how to [legally] extract from others that which others are not predisposed to give" (Crenshaw, 1988: 1365). The pragmatic utility of rights is explored further in chapter seven.

Critical race theory critiques of critical legal studies stem from the latter tradition's lack of theoretical and practical appreciation for how race continues to act as a structural impediment to make 'whites' comfortable at the expense of subordinate minority groups. Critiquing this lack goes to the heart of the critical race theory program.

While it is unnecessary to reproduce in its entirety the central tenets of critical race theory, three of its core features are relevant to the present research in that they demonstrate the unobvious but powerful ways that race impacts the formation of Métis identities, both in the courts and in larger society. As such, they bear elaboration. These include: 1) the normality and pervasive centrality of race/racism in (and to) contemporary western society; 2) the powerful role of 'law' in (re)producing racism; and 3) law's constitutive, rather than merely regulative, power (Aylward, 2000; Crenshaw, 1997; Delgado, 1998; Delgado and Steficic, 2001; Williams, 1991).

(1) the unconscious normality of racism

Human beings are different in all kinds of ways. Since no differences are obviously or self-evidently so, *which* differences are thought to matter is necessarily based on their significance in a particular moment in time and space and in a particular discursive regime. Racial difference exists to the extent that we choose certain features and attach negative social signification to them. While historically this negativity was often attached to *physical* differences, for centuries now it has applied to *cultural* attributes to endorse and maintain social relations of inequality. Several years ago while teaching one of my Native Studies classes, this issue of 'differences that matter' was brought home in a particularly stark fashion. This particular class was feisty and often engaged in extensive class discussion during the lecture period. One such interaction featured an argument between two students who simply didn't see eye to eye about how the world worked. Michelle[54], a Native student, was sharp – she knew the importance of history and context, and excelled at going beyond the obvious explanations for things. Jay, a self-described 'Alberta boy' and although also bright, was by trade a construction worker who came back to university to 'get an education'. To him, the world was an obvious place and did not require the help of a rocket scientist to figure out. Jay was a big believer in 'common sense'.

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[54] Michelle and Jay are pseudonyms.

Prior to working construction, Jay worked as a busboy at a local restaurant. He and Michelle's argument began with a story he related to the class regarding an incident he remembered from being a busboy. In his story, Jay explained that he was in charge of dumping the grease from the grease traps. One night, just after dumping a load of grease, three 'drunk, scrubby Native guys' accosted him. According to his story, they 'cornered' him, asked him for money and became belligerent when he was unable or unwilling to produce any. Scared, he threw the empty grease pail at them and ran back into the restaurant. His story was meant as a corrective to Michelle's earlier point that we often use racist terminology without even thinking about it; in her example she talked about drunken Natives and the fact that we see their Nativeness as an important attribute for explaining their intoxication. In Jay's reply he attempted to get Michelle to acknowledge that there *were* drunken Natives and that they were potentially dangerous.

Michelle responded to his busboy story by questioning why their being Native was a noteworthy aspect of the story. She argued that to the extent that he attached negative connotations to their being Native without problematizing his focus, his story actually validated rather than contradicted her point – that is to say, their Nativeness functioned to assist Jay in puzzling out why he was confronted and to explain it to others. Surely, Michelle pointed out, non-Natives also drink and could be scrubby? Jay refused to back down, accusing her of trying to argue that Native people did not drink. Michelle reiterated *her* point that like many non-Natives Native people *do* drink, but tried to get Jay to discuss why he thought it important to point out that they were Native. Exasperated, Jay reiterated that he mentioned this fact because they *were* Native. As their exchanges became less civil, I finally intervened.

Jay's account of his confrontation is, it seems to me, indicative of liberal accounts of racism. Although like all of us Jay is racist, he would no doubt have become defensive had Michelle gone a step further or taken a more accusatory tone and called him racist, because he lacked any reflexivity about his racism. For him, racism is something atypical and aberrational or, more dangerously, harmless. This is typical of how race is constructed in Canada (though obviously, not just Canada). Far rarer do Canadian discussions emphasize the degree to which most of our racism takes place below the level of conscious vitriol. Racism is neither completely intentional nor unintentional (see Lawrence, 1987: 322) but rather, occurs imperceptibly, making it difficult to locate, name or alleviate. For all intents and purposes it is invisible, precisely because we view it as normal.

To the extent that Canadian society is racist, it is neither peripheral nor isolated. It is normal and pervasive and represents 'business as usual' (Delgado & Stefancic, 2001: 6). It is deeply embedded in our society's institutions, the day-to-day practices of our citizens, and the stories we tell ourselves for why people act as they do. So much so, in fact, that our ability to comprehend racism seems limited to those rare moments when it rears its head enough to shock the nation. Most of the time, however, we live lives that include an unconscious use of racism and racist practices but with little or no understanding of their harmful effects, for example, the use of the term 'nigger toe' to refer to Christmas Brazil nuts, or the use of the word 'Jewed' as a verb to indicate a successful bargaining to reduce the price of an item.

Lacking an awareness of our racism is hardly distinctive – it is indicative of the views tacitly held by most Canadians, transmitted through our parents, peers and media as rational understandings about how the world works (see Lawrence, 1987: 323). In his discussion of racism in America – a discussion easily extended to Canada – Lawrence writes that we

> share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites. To the extent to which this cultural belief system has influenced all of us, we are all racists. We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions. In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation (1987: 322).

Thus, most racism is not of the 'frothing at the mouth' variety that makes the news. Instead, it consists of the myriad words, phrases and private and public discourses uttered unthinkingly on a daily basis by even the most well-intentioned people with no thought to their ability to wound and no problematization of their usage. Importantly, this is also what makes racism so hard to change – although we have not been explicitly 'taught' it, we use it unproblematically and indeed, are often quite defensive when called on words or phrases which unconsciously raise its spectre.

(2) 'Law's' racism

If we live in a racist society in which we are all implicated, it follows that court texts are implicated in this racism. To the extent that courts are said to exert a constitutive role – they produce social relations rather than simply reflecting them – they must play a powerful role in reproducing racism in contemporary society. On the one hand, this explanation reverberates with many minority groups. In particular, Aboriginal communities who have suffered the indignity of court decisions ruminating on whether their ancestors were 'human' enough to satisfy European notions of occupation (i.e. the Supreme Court of Canada 1978 *Baker Lake* decision) take this as given. Moreover, that Canadian 'law' situates itself as the final arbiter of social order – in opposition to, for example, Aboriginal systems of governance – its racism is equally obvious. However, these arguments contrast starkly with Liberal understandings of 'law' as a rational, 'blind' soothsayer who doles out justice. To state that racism forms the very core of contemporary western 'law' is also to make the controversial point that 'law' operates not in *spite* of racism, but rather *because* of it. That is to say, racism in 'law' can neither be averted nor avoided – it is constitutive of 'law' and legal decisions and as such also represents 'business as usual'.

As I say, this is an important but controversial point. As I discuss in the second part of this chapter, all social fields (the courts included) require their agents to believe in the field's effectiveness and thus, legitimacy. In participating in a field and becoming competent in the technical expertise required for successful participation, legal actors are reproducing the field's legitimacy. In the context of the courts, despite the considerable disagreements about what make Métis Aboriginal, the vast majority of the legal actors concur that constitutionally protected Aboriginality can be understood as that which was integral to Métis communities prior to the imposition of colonial regimes. That is to say, only Métis practices historical in origin are eligible for protection. In short, Aboriginality is historical. Insofar as legal actors engage in and reproduce these forms of knowledge in their legal factums, they reproduce (unwittingly or not) racist conceptions of Aboriginality.

(3) 'Law' is Constitutive

According to liberal theories of justice (i.e. Dworkin, 1986) the role of 'law' is to act as an arbiter of justice. 'Law', in this sense, works to "actively distribute power, primarily in the form of rights and jurisdiction, among a variety of legal actors, including individuals, groups, institutions and governments" (Macklem, 2001: 21). The challenge put to liberal theorists by critical race theorists is the extent to which the 'variety of legal actors' constitute well-established groups rather than loosely connected ones whose ability to adhere is based in part on the decisions courts render. That is to say, 'law' does not merely regulate stable, pre-formed groups, it can inhibit their very ability to remain stable and/or to evolve.

> ...law does more than simply codify race in the limited sense of merely giving legal definition to pre-existing social categories. Instead, legislatures and courts have served not only to fix the boundaries of race in the forms we recognize today, but also to define the content of racial identities and to specific their relative privilege or disadvantage in the U.s. society" (Haney-Lopez, 1996: 10).

This is a particularly salient point in the context of Aboriginal legal issues because in a very real sense courts can, for legal purposes, render individuals legally 'white' and vice versa. Historically, in as far as those self identifying as Métis were treated as Canadian citizens (as opposed to status Indians) we see the impact of colonial administrative decisions. Contemporarily, numerous court decisions have produced a context within which *Indian Act* band struggles over community membership have taken place – in such struggles, band members have been added (or deleted) from band lists and as such, have effectively been rendered legally 'white' or 'Indian' based on the lead of single court decisions[55]. In this sense courts are not presiding over pre-formed categories but rather they play a powerful role in actually producing their boundaries and substance.

Discursive Constructions of 'Law'

If the previous two legal traditions emphasize the impact of court decisions on social groups, discursive constructions of 'law' tend to emphasize its position in contemporary society as a site not just of inequality, but knowledge production. Using the contradictory insights provided by Foucault's scattered writings on the subject, a 'tale of two judiciaries' can be fashioned. In one account, Foucault argues that 'the juridical' has become a dog on a leash, subordinate to the machinations of the disciplines to mask the 'real' workings of disciplinary power and expertise extended through the rise of human sciences (Foucault, 1980). In other words, Foucault posits the existence of institutions within which a distinctive judicial logic is subsumed under disciplinary rationalities. "Another truth has penetrated the truth that was required by the legal machinery; a truth which, entangled with the first, has turned the assertion of guilt into a strange scientifico-juridical complex" (1977: 19). Moreover, this articulation of the subservience of judicial rationalities to those of the disciplinary logics is, for Foucault, quite similar to his accounts of the earlier judiciary, where these logics were tied to the will of the sovereign (see 1977: ch. 1; 1980: 95-6). Hence, although the juridical moves from sovereign rationalities (punishing transgressions to demonstrate sovereign power through torture and 'the spectacle of the scaffold') to passing judgment in an effort to 'correct' and to 'cure' (motivations with intricate ties to the expertise inherent in the new disciplinary sciences), the judiciary remains understood instrumentally. A dog on a leash still, but now with two leashes instead of one; both the need to punish and the investment of its discourses by human sciences.

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[55] An infamous Canadian court case involved the legal battles of the resource-rich Sawridge Band of northern Alberta, who for various reasons attempted to maintain the size of its band membership, despite the addition of new members as part of Bill C-31. For an in-depth analysis of this case see Green (1997).

Conversely, scholars have used Foucault's insights to construct a different model of 'law'. This is particularly evident in the work of Hunt (1993), Hunt & Wickham (1994) and Smart (1989). These scholars have, in critiquing Foucault, articulated an alternative account for understanding the juridical; in their accounts, the judiciary is neither dependent upon nor subservient to disciplinary logics but rather acts as both a coordinator and a gatekeeper of these external knowledge/powers. The juridical, in this formulation, represents a fundamentally powerful *truth claim* in contemporary liberal democracies, rivaled perhaps only by Science (Foucault, 1980; Smart, 1989; Sutton, 2001). A core of Foucault's own work is dedicated to demonstrating the elevation of 'psy' discourses to the status of 'truth'.

> Each society has its regime of truth, its 'general politics' of truth: that is, the types of discourse which it accepts and makes function as true; the mechanisms and instances which enable one to distinguish true from false statements, the means by which each is sanctioned; the techniques and procedures accorded value in the acquisition of truth; the status of those who are charged with saying what counts as true (Foucault, 1980: 131).

Foucault's understanding of truth is antithetical to conventional Enlightenment claims, which suggest that truth can only be arrived at outside the machinations of power. For Foucault, truth is bound to power, manifested in and through power, and intricately tied to the truths established by human sciences (what he termed 'pseudo-sciences'). In this second formulation ('law' as a truth claim) the judiciary, like all powerful truth claims, possesses the potential to limit the articulation of certain kinds of statements while allowing the proliferation of others. Even more important is Foucault's suggestion that truth claims "exert a sort of pressure and something like a power of constraint on other discourses" (1981: 55). That is to say, juridical relations coordinate and (if need be) push out other forms of truth/knowledge.

Positioning 'law' as a truth claim has been harnessed by feminist legal critiques, in particular the pioneering work of Carol Smart (1989). Smart suggests that 'law' possesses its own prescriptions for what is 'true' and it generates its claims in much the same way as Science operates. Like science, the judiciary has its own method, its own area of jurisdiction within which it can test its 'theories', certainly its own specialized language and specialized personnel who are required to operate it, and it has its own systems of results. Although it "may be a field of knowledge that has a lower status than those regarded as 'real' sciences, none the less it sets itself apart from other discourses in the same way that sciences does" (Smart, 1989: 9). Likewise, in her excellent article, Lise Gotell (2002) argues persuasively that "[l]egal discourse, shrouded by the mantle of its "Truth," *plays a constitutive role*; it constructs subjects through the discursive formulation of the terms of their intelligibility" (2002: 97 – emphasis added). The importance of understanding 'law' as a site of knowledge production is elaborated in the methodology chapter where I discuss the limits of knowledge within which judges were situated in rendering their court decisions.

Summary

Although the literature loosely falling under the rubric of critical legal studies, critical race theory and Foucauldian discussions of 'law' are scattered, several relevant themes emerge. First, 'law' is deeply political and in the sense that its decisions are not rendered outside of power but rather, are immersed in it. Thus, when judges make judicial decisions in the name of 'correct jurisprudence', they tacitly express and endorse one set of social and political views at the expense of another. This privileges certain groups while subordinating others. This insight, also raised in feminist accounts, is an enduring and useful feature of critical legal studies. Second, if 'law' is political, like all social institutions it is also racist. Racism is a normal – banal, even – feature of contemporary Canadian society and it represents a pervasive feature of Canadian jurisprudence. It operates according to racial stereotypes and it passes judgment on subordinate minority communities using these reified, racialized criteria. Yet, the racism inherent in law is ambivalent – paradoxically law is both racist and empowering. Third, courts are never essentially oppressive – they are useful (or not) at particular moments. Thus, they are potentially transformative and in any case, it is not as though minorities who hold little institutional power possess a plethora of options[56]. Fourth, and finally, courts are constitutive. They do not simply reflect, regulate nor tinker at the edges of existing social relations. Rather, they possess the ability generate the very social relations they purport to merely regulate and possess a persistent, pervasive and persuasive influence on the shape and behaviour of societies. Equally importantly, they possess the ability to marginalize alternative ways of thinking about and acting on social relations.

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[56] McCann (1998) argues in fact that "the fact that movements frequently construct their claims from legal conventions and deploy legal tactics reflects less the mystifying tendencies of law than its modest utility for defiant groups short on alternative strategies of action" (1998: 91).

Part two of this chapter takes the insights gleaned from critical legal theory, critical race theory and Foucauldian constructions of law to more appropriately understand how courts in particular are positioned in contemporary Canadian society. It is true that courts are political, racialized and sites of knowledge production (and thus, marginalization). The problem with the theoretical traditions just surveyed, however, is that they position something called 'law' as a uniform or homogenous entity and assume that despite a number of different sources of law a basic consensus exists between these different elements. This issue sometimes arises in friendly debates I have with law student and lawyer friends. I will begin a conversation with an outlandish claim like 'there's no such thing as 'law'', to which, after their apoplexy recedes, they reply with the argument that although different *sources* of 'law' certainly exist, it does not follow that there is no such a thing as 'law'.

I reply, what are the sources of 'law'? They usually name two, the courts and the legislature. My point to them, as it is here, is that instead of thinking about 'law' as comprised of courts *and* legislature, we need to also think more carefully about courts *versus* legislature. In the context of Aboriginal rights litigation, registering the tension between the two social fields is important to understanding not only why Aboriginal communities litigate but also how they form their broader political strategies. In this sense, my argument is that courts are not constitutive in that they rarely directly form social relations or identities – courts are extremely impractical in this sense. However, they do generate a host of discourses which are then taken up in more directly constitutive ways through enabling and subordinate legislature or more direct ad hoc policy. But this 'gap' between what courts decree and what governments eventually formulate gets lost in uniform or homogenous constructions of 'law'. Thus, in the next section I harness some of the insights of the theoretical traditions surveyed in the first part of this chapter but retool them in the context of positioning courts as social fields.

PART II

From Constitutive Law to Generative Courts: Positioning Courts as a Social Field

The social field is the analytical hallmark of Pierre Bourdieu's sociology and is a metaphorical[57] space of struggle and competition. Social fields are organized around a series of hierarchically organized practices, behaviours and values that, although not completely autonomous from the world outside that field, nevertheless sustain its dynamic in ways not reducible to larger structural explanations. Internal actors operate according to deeply seated and largely pre-reflective patterns of thinking and behaviour – *habitus* – which make it both possible and desirable to operate within a field. Importantly, these actors believe in both the source (the field's 'capital') and the effectiveness (if not necessarily the present form) of struggles occurring within the field within which they are situated.

Belief in a field's effectiveness (i.e. its legitimacy) is crucial to motivating the struggles that arise within its boundaries, the goals they pursue and the forms they take and it creates a context of fundamental agreement over the fundamental conditions of the field. This is so despite the range of disagreements which occur within the field itself. According to Bourdieu, this fundamental belief in the field's legitimacy presupposes 'misrecognition' of the objective conditions of the field. That is to say, internal actors buy so strongly into the field's logic, purpose and effectiveness that they are unable to take a step back and understand the power dynamics of their objective positions and the impact they exert on the field's struggle. Finally, fields are never completely autonomous; the structure of one field, although comprising a struggle irreducible to that of other fields, nonetheless bears an affinity with other fields. For example, 'lower' forms of art characteristic of the artistic field (say, the infamous velvet painting of Elvis or dogs playing pool) are more likely to be consumed by actors holding lower positions in the economic field. This homology is a result of a similar habitus among agents located in multiple fields[58].

The Juridical Field

If Bourdieu positions social fields as sites of intense struggle where actors compete for capital, juridical struggle is comprised of the right to control the substance and thus determine the stuff of 'law' (Bourdieu, 1987: 817). Importantly, this struggle ensues on an uneven playing field; the juridical field's operation (like that of all fields) depends on a division of labour between the actors and/or institutions internal to the field's boundaries. For example, Bourdieu explains the dynamism of French law by virtue of an antagonism between legal scholars and purists, and jurists and practitioners, between the constructors of doctrine and its applicants. Moreover, the efficacy of struggle means that no actor's position in the juridical field is ever completely safe – the dynamics of a field at a particular historical moment can transform the field and thus, the configuration of positions within it. In a Canadian context, for example, the last twenty

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[57] It is important to understand that social fields are not 'real' – they are analytical spaces and thus, represent researchers' ontological guesses. Their strength turns on their ability to objectively account for existing social relations within the fields.

years have borne witness to a precipitous rise in the position of the Canadian courts in the Canadian political field (see Manfredi, 2001), a rise important for contextualizing Métis political organizations' use of the courts to advance their struggles for justice. Yet, the power of the juridical field in cloaking its power is demonstrable in the extent to which 'law' is perceived in "the equity of its principles, in the coherence of its formulations, and in the rigor of its application" (Bourdieu, 1987: 818).

This juridical division of labour holds enormous sway over the modes of reasoning available to and preferred by legal actors. The juridical field is organized around a firm hierarchy and established sets of procedures and language which grounds decisions, their interpretations and the accepted textual sources which grant decisions their authority (Bourdieu, 1987: 818). In this sense, the division of labour characterizing the juridical field works to hide the extent to which power struggles underlay the substance of law – 'law' is instead seen as the result of a kind of 'legal reasoning'. This perception is held not just by the uninitiated but crucially, by the legal actors themselves: "[l]egal scholars…have an easy time convincing themselves that the law provides its own foundations, that it is based on a fundamental norm…such as the Constitution" (1987: 819). Moreover, this division of labour engenders narrow and rigidly conceived 'principled interpretations[59]' which require the appropriation and translation of common language into a 'juridical speak', designed to "express the generality or omnitemporality of the rule of law" (1987: 820).

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[58] This section used the framework found in Swartz (1997: ch. 6).

[59] These interpretations are channeled through the courts' reliance on a doctrine of *stare decisis*. This doctrine is reliant on the value of precedent in deciding cases and is explained below.

Thus, the juridical division of labour produces, quite unconsciously and independent of any particular actor, a set of rules and practices which authorize certain interpretations, dismiss or marginalize others, and in any event base their claim on transcendence or universality. Bourdieu is nevertheless careful to point out that the juridical field and the texts it produces possess no intrinsic or essential meaning, nor does it result from the solitary labour of judges. Rather, the substance and practice of 'law'

> is really only determined in the confrontation between different bodies (e.g. judges, lawyers, solicitors) moved by divergent specific interests. Those bodies are themselves in turn divided into different groups, moved by divergent (indeed, sometimes hostile) interests, depending on their position in the internal hierarchy of the [field]… (Bourdieu, 1987: 821-2).

The actual substance of law is thus highly dependent upon the relative positioning of the 'different bodies', as is the form of the juridical corpus itself – its degree of formality and rigidity stems from the relative positioning of legal actors dedicated to such a doctrinal normalization. Judges represent a key force in the application of law and in fact, Bourdieu explains differences in national traditions (between, for example, Germanic or French and American Law) by the relative positioning and power of judges vis-à-vis legal scholars[60] (1987: 822).

For Bourdieu, jurisprudence must be viewed in light of the constant antagonism between doctrinal scholars and their practical application through judges. While the two may appear to hold oppositional views on any given legal issue, each is necessary to the other's existence. Legal scholars work to rationalize and formalize legal principle and rules; this labour produces texts which are used by judges in the adjudication of court decisions. These decisions are in turn valourized or criticized by purists, which engenders the production of further doctrine. Bourdieu is quick to distance his argument from those of legal positivists, however. Judicial decision making is not the sterile application of legal principles constructed by doctrinal scholars to practical situations but rather, "the application of a rule of law to a particular case is a confrontation of antagonistic rights between which a court must choose" (Bourdieu, 1987: 826). Thus, and following in the sensibilities of legal realism, Bourdieu argues that judicial decision making is fundamentally *inventive*. Although the presence of legal rules reduces the variability of the decision making, enough arbitrariness remains present to imbue the substance of 'law' with an irreducible elasticity. Judges may define legal principles narrowly or broadly, or may decide to find them irrelevant altogether. Thus, textual meaning is never to be found in the text itself but rather, in the struggle over it (1987: 829). We pursue this line of discussion below in our elaboration of judicial sensibility and the doctrine of *stare decisis*.

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[60] According to Bourdieu (1987), in France legal scholars can hold a more powerful sway over judicial decision-making since this decision-making is concerned primarily with doctrinal interpretation rather than, in a common law context, precedent.

The juridical division of labour is important to the present research in that it separates my work from a bulk of the scholarship on Aboriginality and law in Canada. By and large, scholarship focusing on this relationship fixates almost entirely on critiquing Supreme Court of Canada *decisions*. With varying degrees of sophistication, Aboriginal legal issues commentators have leveled[61] a number of criticisms at what they suggest is the racism underpinning these decisions. Unfortunately, these critiques are premised almost exclusively on a close reading of the court decision itself. Framing the courts as a social field, however, means that decisions are merely the conclusion of an intense struggle between legal practitioners – the decision's content tends to reflect the beliefs of those who struggled most effectively, while marginalizing the views of those who did not. In a social field, the court decision itself is but one – albeit crucial – piece in the larger puzzle. A fuller understanding of the context within which those court cases were rendered requires taking into account the documentary context – whether factums, expert witness reports and testimony, lay testimony and oral arguments – within which the judge was situated in rendering the decision. The conventional critiques mentioned earlier, powerful and eloquent though many of them are, are utterly lacking in any serious consideration of the materials used (or avoided!) by the justices in crafting their decision, or of indigenous political strategies embodied in their submitted court materials.

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[61] For a flavour of this discussion, see Alberta Law Review (1997), Barsh & Henderson (1997); Borrows (2002), Bell & Asch (1997), Macklem (2001).

Aboriginal rights commentary is by no means unique in its almost exclusive focus on court decisions. Virtually all critiques of contemporary 'law' that use an empirical reference rely solely on these texts. At one level, this is a reasonable and defensible methodological choice insofar as the courts are clearly positioned as a powerful instance of 'law' in both Canada and the United States. Yet, relying exclusively on the text of the decision itself has the effect, intended or not, of dismissing the dynamism crucial to its production, of flattening the terrain of struggle within which judges write. It assumes (must assume) that the boundaries at the edge of the judicial imagination of the Canadian courts are produced exclusively by the judges themselves. Obviously, judges constitute the most important legal actor in the juridical field. In a sense, theirs is the final word. It is not, however, the only one – the *Powley* court files make it clear that the case is far more complex than a mere reading of the decision provides.

Moreover, scholarship which focuses on court decisions as a basis for critiquing 'law' misses an additional and equally crucial insight. If we are to properly position courts as sites of political contestation and equally, as spaces of knowledge production, we need to understand *how* interest groups (in this case Aboriginal communities, provincial or federal governments, non-Native interveners, etc.) participate in this political contestation and this knowledge production. For the Aboriginal rights commentators mentioned earlier, this really is not an issue since they are first and foremost interested in constructing (what in their opinion constitutes) a 'correct jurisprudence'. Conversely, sociology of law scholarship is not (and should not be) interested in obtaining the correct answer to a legal question but rather, focuses on the *effects* of court decisions on broader social relations. Both American and Canadian sociology of law scholarship is, however, marked by an astonishing omission – they seek to study the impacts of court decisions on social groups without paying *any* sociological attention to the production of the court decisions themselves and more specifically, the role of the relevant interest groups in shaping the contours of the decision through their participation in the form of intervener factums[62]. This lack of attention on the relationship between social groups and the courts needlessly reifies popular conceptions of 'law' and 'society' as ontologically discrete categories.

Thus, the present research is based on an empirically richer consideration of the legal practitioners involved in the *Powley* case. In addition to the Court of Appeal for Ontario and the Supreme Court of Canada decisions, I examine some sixteen hundred pages of court testimony, four expert reports, twenty-eight intervener factums and about four hours of oral testimony put before the Supreme Court of Canada (this is discussed more fully in the methodology chapter). Consideration of these issues provides a sounder methodological basis for explaining why the courts arrived at the decision they did and a broader factual basis for understanding the context of this judicial decision making.

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[62] For several exceptions in a Canadian context, see Gotelle (2002) and Martel (1999).

Much of the legitimacy of 'law' turns on its ability to take unruly social conflicts and translate them into ordered, technical legal issues. This power is fundamental to its ability to sustain a veil of neutrality and to transform its decisions from acts of naked violence to legitimate acts of rationality and objectivity (Bourdieu, 1987: 824). Likewise, its supposed rationality and objectivity renders 'law' *necessary*: many protagonists use 'law' precisely because of these rhetorical characteristics. Conflicts become dialogues; apparently irreconcilable debates between unequal protagonists are rendered equal and ordered into a progression towards 'truth'; the original aggrieved and aggressor become peripheral players, second(s) to the technical competency of the legal actors themselves. Thus, although there is nothing natural about the need for law, 'law' *appears* natural because it translates social grievances into specific, formalized, rigidly defined harms for which a cause is specifically promulgated, and through which specialized dialogue is carried out (Bourdieu, 1987: 833).

Importantly, entry and long-standing position in the juridical field usually presupposes that actors buy into the field's legitimacy. "To join the game, to agree to play the game, to accept the law for the resolution of the conflict, is tacitly to adopt a mode of expression and discussion…it is above all to recognize the specific requirements of the juridical construction of the issue" (Bourdieu, 1987: 831). That is to say, once stated in legal terms, a social issue immediately becomes amenable to a legally regulated struggle. Likewise, no social issue is acontextually legal (or non-legal). Its suitability is entirely dependent upon the configuration of positions within the juridical field at that moment and the positions taken by agents in this configuration.

Various factors affect this *translation* of social conflicts into legal issues: the role of legal professionals themselves in making decisions about the eligibility of a claim for legal remedy (Felstiner *et. al.*, 1980-1: 632); the inability of the court-as-policymaker to set its own agenda (Olson, 1984); and the fact that this inability often expands the scope of the issue through the additional participation of outside institutions or actors, through their role as litigants or interveners (Galanter, 1974; McCann, 1998). Most important in the translation from chaotic conflict to ordered dispute, however, is the juridical field's distinctive *language*. Turning social disputes into specifically legal ones involves a fundamental shift in the language utilized and hence, the need for specialists. Translating social conflict into legal problem imbues it with a neutrality, impersonality and objectivity that present conflicting actors as equal protagonists. Bourdieu explains that it is important not to understand this simply as ideology, but rather, that

> such a rhetoric of autonomy, neutrality, and universality, which may be the basis of a real autonomy of thought and practice, is the expression of the whole operation of the juridical field and, in particular, of the work of rationalization to which the system of juridical norms is continually subordinated…Indeed, what we could call the "juridical sense" or the "juridical faculty" consists precisely of a universalizing attitude…This fundamental attitude claims to produce a specific form of judgment, completely distinct from the often wavering institutions of the ordinary sense of fairness because it is based on rigorous deduction from a body of internally coherent rules (Bourdieu, 1987: 820).

Through the translation process 'law' gains the ability to define an issue's translated form, to decide which conflicts are worthy of legal translation, and which are best left outside the juridical arena. As a result of its role as an engine in this redefining process and its aspirations to rationality and normative neutrality, 'law' increasingly comes to be seen as *necessary*. It pulls into its ambit "areas of social existence that previously had been conceded to prejudicial forms of conflict resolution" (Bourdieu, 1987: 835), which in turn creates new legal needs and categories. Moreover, in creating itself as a normatively necessary institution, 'law' limits the universe of possible actions and the conditions of feasible struggle within which social justice is thought about and acted upon, let alone achieved. Its labour effectively constitutes a monopoly over the avenues of social struggle deemed feasible in a given time and place[63].

The aggregated power built up over centuries of struggle has imbued the juridical field with a tremendous amount of contemporary power and, since it is able to hide the power behind its operation, legitimacy. So much so in fact, that it holds the ability to produce its effects simply by its own operation. "Law is the quintessential form of the symbolic power of naming that creates the things named, and creates social groups in particular" (1987: 838). Its labour effectively formalizes pre-existing categories and brings into reality as 'things' what are in fact nothing more than its own pronouncements. Moreover, although the substance of these judgments represent the conclusion of an intense struggle between legal actors, they assume the status of truth, "creating a situation in which no one can refuse or ignore the point of view, the vision, which they impose" (Bourdieu, 1987: 838).

Social issues taken up and translated in a legal context are reformulated into *rights-oriented* disputes and we, *rights-bearing* subjects. In the liberal tradition, rights have been characterized as a "powerful bulwark against the manipulation of humans by governments and other institutions in the modern world" (Tully, 1993: 5). They are presented as 'domains of freedom' which prevent unjustifiable interference[64] and are said to mediate the interests of and conflicts between individual and state interests (see especially Dworkin, 1977). To wit: "[w]hen rights and state interests are perceived to be in conflict, each with their claim to legitimacy, courts are drawn toward "weighing" the "strength" of state interests against the "degree" of intrusion on individual rights" (Pildes, 2002: 180-1). This atomistic conception of rights – protecting individual liberty against state intrusion – often anchors battles waged in moral philosophy regarding the relationship between 'the right' and 'the good'[65].

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[63] Bourdieu's argument bears a strong affinity to the critiques of liberal conceptions of 'Law' put forward by critical legal studies (see Hutchinson, 1995).

At one level, in a place like Canada this translation process can be painful, since 'law' represents a major avenue through which the historical oppression of minority groups was orchestrated. Thus, groups that "articulate the problems of our daily lives using the concept of rights and all that it entails, [are] consciously or unconsciously squeezing our lived experiences into a pre-ordained world" (Razack, 1991: 13)[66], a world often structured on a denial of those lived experiences. However, the benefits of taking the litigation road can often outweigh the costs. For many, the translation of grievances into a 'rights' discourse affords the opportunity to express their oppression in an idiom widely understood by broader Canadian society. As well, if Aboriginal people are to ensure lasting change in state structures we first need a 'listening state' (Simpson, 2000; Tully, 2000); a rights discourse represents a powerful way of 'talking' to the state. This is not to say that litigation is unreservedly good (or bad); it is more (or less) effective at a given moment, based on the configuration of power relations within the juridical field and the place of the juridical field in the geo-political contours of the Canadian nation state.

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[64] In the liberal tradition, liberal rights are almost always 'negative' rights, whose role is to *prevent* unjustifiable interference on an individual's liberty. Positive rights, conversely, are rights that *compel* governing institutions to act in particular ways to assist in securing this liberty.

[65] See Kymlicka 2001, ch. 1 for a summary of these debates.

[66] Various legal commentators have noted the extent to which the 'categorical thinking' underlining judicial decision-making undermines the ability of various 'Charter groups' to achieve full legitimacy for the larger groups to which they claim allegiance in that it forces these groups to compare themselves to a pre-existing view of 'normal'. See Gotell (2002); Iyer (1995); Kropp (1997); Stychin (1995).

Since the 1960s, 'law' has been potentially transformative for oppressed minorities because through rights they have been able to draw up on its *symbolic* power (Edelman & Cahill, 1998: 17[67]). However cynically one may react to liberal legal philosophical claims about their rights, they possess a powerful symbolic status. "The language of rights makes political arguments more potent...because even skeptics have some ambivalent faith in rights, and...because the language of rights has a deep appeal for most of the public to which judges, juries, and attorneys have to be responsive to some degree" (Edelman & Cahill, 1998: 17). Similarly, the quixotic power of rights so adamantly opposed by critical legal theorists is exactly whence rights derive their power and thus, why they represent a potentially progressive avenue of change for Aboriginal communities. "Rights discourse, precisely because of its mystifying power in white America's legal and political mythology, secured significant ideological high ground for the legal and political movements of minority groups in the post-World War II era" (Williams, 1987: 121). The same is true for Métis litigants: the power of the *Powley* decision resonates far beyond the wording of the decision itself – it builds the legitimacy of these communities in the public eye and may function as a way to bring together otherwise disparate communities. More immediately, legal victories build up a juridical capital which is potentially convertible into bureaucratic capital in struggle against Canadian government(s).

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[67] Symbolic power represents one of the cornerstones of Bourdieu's analyses for how social inequality is reproduced – achieving symbolic power is the goal of all struggles. In a sense, it is the social equivalent of turning lead into gold. Symbolic power becomes symbolic when it is seen as legitimate and its arbitrariness is effectively masked.

In accounting for law's symbolic efficacy, Bourdieu suggests that it is not enough to understand it as the result of false consciousness, hegemony or collective consensus. In addition, the *formalization* produced through the collective labour of actors operating within the juridical field constitutes an important part of its legitimacy. Part of law's claim to universality is based in its ability to demonstrate that rules or principles used in any particular case are applicable beyond the contingencies of that particular situation. These claims to universality, and the formalization imbued by juridical actors, are crucial to the juridical field's perception as a legitimate (and legitimized) discourse – not only for its internal actors but more importantly, for 'lay persons' as well.

> …one of the functions of the specifically juridical labor of formalizing and systematizing ethical representations and practices is to contribute to binding lay people to the fundamental principle of the jurists' professional ideology – belief in the neutrality and autonomy of the law and of jurists themselves (1987: 844).

Thus, law's 'form' give the appearance of a marriage between morality and rationality: it expresses a commitment to collective values and norms and, through the formal, written codification of juridical rules and procedures, produces a seemingly neutral and authorless transmission.

The formalization of juridical fields is made possible through the use of writing, what Bourdieu refers to as a 'universalizing commentary' (1987: 844). Writing allows for the transmission of legal principles, rules and formulas across time and space and equally importantly, fosters the conditions under which texts become autonomous (and thus, anonymous). This autonomy and anonymity is crucial for the production of symbolic legitimacy, because it comes to be viewed as a "form of scholarly knowledge, possessing its own norms and logic, and able to produce all the outward signs of rational coherence…" (1987: 845). In turn, this perception imbues legal writing with a 'seal of universality' which effectively masks the power struggles which anchor its production.

This formalization induces an artificial clarity or predictability that, through the symbolic legitimacy of juridical labour, possesses all the appearances of real clarity and predictability. Williams (1991) makes this point more sharply: "'Theoretical legal understanding' is characterized, in Anglo-American jurisprudence, by[…] The hypostatization of exclusive categories and definitional polarities, the drawing of bright lines and clear taxonomies that purport to make life simpler in the face of life's complication…" (Williams, 1991: 8). Bourdieu's point is somewhat more complex than Williams; for Bourdieu, formalization strengthens the calculability[68] of legal rules and procedures. Importantly, although formalization does not determine the actions of juridical actors, it disciplines them in that it provides a stronger sense of appropriate and inappropriate behaviour, which in turn impacts on the kinds of choices legal actors make (Bourdieu, 1987: 849). This operates as a crucial bulwark to the interpretive calculus they use in deciding whether to transgress boundaries of propriety. Moreover, this formalization creates a sharp border – those possessing a technical proficiency are able to struggle efficiently and effectively (what Bourdieu refers to as 'putting law on their side') while others lacking this competency are perpetually on the outside looking in.

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[68] I should point out that I am not suggesting that improving the calculability of legal rules is the same thing as improving their predictability. It makes clearer a consensus of how to interpret rules, but legal actors' own dispositions will determine whether they agree to act according to a particular rule or perhaps, what 'acting according to the rule' will actually look like in practice.

This is an important point. In addition to starkly securing the boundaries of the field, the formalization of juridical rules and procedures makes it difficult to challenge the juridical field's accepted orthodoxy[69]. Likewise, this formalization stems from the internal configuration of juridical actors, making it difficult to change it; Bourdieu suggests that the juridical field has far more rigid hierarchies, not only for directing struggle, but for narrowing the strategies deemed appropriate for challenging the orthodoxy. Thus, if we recall that part of the successful participation of a juridical field requires an interest in both the stakes at risk and the form of the struggle imposed, even those holding marginalized positions who attempt to change the configuration of the field are unlikely to use methods outside of those deemed appropriate by the field itself. Consequently, whether they succeed or fail, most challenges simply add to the overall legitimacy of the field's operation, since actors believe in the form of the field and merely wish to change their position in it. That is to say, if legal actors disagree with the juridical field's present state, rare is the actor who wishes to destroy it altogether.

Although Bourdieu's construction of a social field necessitates the methodological privileging of internal analysis, crucial to his theory is the idea that fields are never completely autonomous, are always to some degree interconnected. Two issues bear this out. First, Bourdieu suggests that fields are interlinked through ‘homologies’. Homologies, a kind of ‘structural correspondence’, presuppose that regardless of their distinctive dynamics, social fields hold in common invariant properties which tend to reproduce positions of privilege and marginalization across fields. In this sense, inequality in one field tends to be replicated across fields, although always in ways distinctive to the logic of each particular field. “The general overall effect is the reproduction of common patterns of hierarchy and conflict from one field to another” (Swartz, 1997: 132). In the juridical field for example, “those who occupy inferior positions in a field (as for example social welfare law) tend to work with a clientele composed of social inferiors who thereby increase the inferiority of these positions” (Bourdieu, 1987: 850).

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[69] In his argument before the Supreme Court of Canada, Prof. Magnet, intervening on behalf of the Congress of Aboriginal People, attempted to dismiss the *Van der Peet* test – the test used to determine the eligibility of Aboriginal litigants for section 35 rights – as a

Secondly, and equally important, social fields are linked by their interconnection to a broader meta-field, what Bourdieu refers to as a ‘field of power’ (see Bourdieu, 1996: pt. 5). This field of power (akin at an abstract level to – though separate from – ‘the state’) is crucially important because it marks the geo-political boundaries within which the ‘exchange rate’ of different forms of capital is conveyed. In Bourdieu’s conception of ‘capital’, once symbolic legitimacy is secured in any field, the possibility exists to convert one form of capital into others. For example, economic capital may be converted into cultural capital, artistic capital may be converted into economic capital and, as discussed more fully in chapter seven, at this historical moment Métis are able to convert gains in juridical capital into bureaucratic capital (see generally Bourdieu, 1996: part 4 and 5).

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relevant test. His argument met with laughter from the Court, and the justice pointed out

Situating the practice of legal actors

Social fields constitute a crucial context for understanding the bounded logic within which actors make sense of the world. Equally important to Bourdieu's explanatory model, however, is how he situates the motivations of actors within a particular field. Importantly, such motivations are based in large extent upon an actor's *habitus*. Habitus encompasses the internalized schemes and perceptions, 'gathered' over time, through which individuals comprehend social reality. These are shaped by the objective structures (i.e. the fields) within which one's habitus are situated (Bourdieu, 1977: 78). One's habitus includes "the cognitive structures which social agents implement in their practical knowledge of the social world". Such structures are "internalized, 'embodied' social structures" that operate "below the level of consciousness or discourse" (Bourdieu, 1984: 468). The habitus is dependent on one's position in a particular field (most importantly among these, for Bourdieu, was social class) and from early on is shaped by the socialization experiences gained through one's family and the position of this family with other like-situated ones. The classificatory schemes embodied in a particular habitus make possible patterned ways of acting, and this acting, in accordance with others sharing a similar habitus, ensures the stability of the field (Terdiman, 1987: 811).

Habitus is also Bourdieu's answer to intellectualized rule following. Bourdieu argues that the activities and actions shaped by one's habitus do not result from the deliberate reflections of actors following rules but are in an important sense pre-

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that even the Powleys' own lawyers weren't pursuing such a radical strategy.

reflective. Rather than as calculating rule followers, we live our lives in large part through the *practical mastery* of these rules.

> ...social science makes greatest use of the language of rules precisely in the cases where it is most totally inadequate, that is, in analyzing social formations in which, because of the constancy of the objective conditions over time, rules have a particularly small part to play in the determination of practices, which is largely entrusted to the automatisms of the *habitus* (Bourdieu, 1990: 145 – emphasis in original).

The issue of why practices rather than rules are important for understanding how and why we act is rooted in the idea that following rules always presupposes an unarticulated background that allows those rules to make sense. Lacking such a background can make even the 'plainest' rules unintelligible (see Fish, 1988; Taylor, 1995). Thus, far more important than the ability to formulate or articulate rules is the possession of a 'practical wisdom', an ability to know "how to act in each particular situation" (Taylor, 1995: 177). In this sense, rules are never self-interpreting; "without a sense of what they're about, and an affinity to their spirit, they remain dead letters or become a travesty in practice. This sense and this affinity can only exist where they do in our unformulated, embodied understanding" (Taylor, 1995: 179) – our habitus.

I noted earlier that precedent plays a powerful role in disciplining the content of juridical texts. Precedent is part of a legal doctrine known as *stare decisis* and forms an important part of legal actors' habitus – especially those of its most important legal actor, judges. *Stare decisis* stipulates that lower courts must follow precedent from higher courts with jurisdiction. Precedent, likewise, consists of cases previously decided on analogous grounds. Judges cannot decide cases any way they choose[70] but rather, must

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situate their decisions within existing case law. Precedent's rhetorical importance stems from its stated ability to ensure not only "continuity, certain fairness and predictability" (Bell & Asch, 1997: 39) but also jurisprudential uniformity, all of which are crucial to managing law's objectivity. Moreover, the doctrine of *stare decisis* is said to represent the 'constraint' of legal reasoning that constitute the basic divide between law and politics in liberal societies.

In their discussion of the racism present in Canadian case law, however, Bell & Asch (1997) argue that if that doctrine of *stare decisis* requires judges to decide 'like cases alike', whether or not two cases are alike is *always* a matter of interpretation. In fact, they suggest further that law is constructed as much in the distinguishing of precedent (i.e. deciding a previous case isn't analogous and thus relevant) as it is in following it. It follows that "[t]he determination of 'likeness' lies with the…decision-maker" (1997: 40), such that judicial interpretation is methodologically crucial to deciding the suitability of previous cases. Bell & Asch's discussion fits closely with critical legal theory sensibilities about judicial indeterminism, which argue that although judicial choice is hidden from view in orthodox discussions of legal reasoning, it is in fact crucial to its construction (see Klare, 1990).

Although precedent is an important factor in how court cases are decided, the act of interpretation means that it *disciplines* rather than *determines* judicial decisions (see Macklem, 2001). In following precedent, judges make decisions based on what they understand to be a 'fair' outcome. In other words, they fulfill an important interpretative

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[70] In fact, their habitus as judges within the juridical field ensures that they will *want* to conform to existing legal doctrine – a deep belief in its validity partly accounts to their

task by putting 'meat on the bones' of existing case law, or by interpreting legislative intent (see Gibson, 1987). In any case, since Aboriginal (and specifically Métis) rights cases are in their infancy, there is little precedent upon which to base decisions. As such, judicial discretion becomes all the more important in shaping the form and content of Aboriginal rights and, in the process, indirectly reconfiguring the relationship between Aboriginal communities and the Canadian state.

Asch & Bell (1997) argue that despite legal actors' reticence in admitting it, judicial decision-making is strongly shaped by the ideologies held by the decision-makers. These ideologies shape their understanding of previously decided cases and account for their interpretative calculus in deciding whether they are relevant. Yet, a reliance on precedent promotes a certain insularity in legal reasoning which gives it the appearance of separateness and objectivity from 'non-judicial' reasoning, not only for lay persons but very often for judges themselves. Their professional training and personal commitment and belief in the edifice of law thus make it unlikely that judges will write decisions which depart radically from what they consider appropriate reasoning.

This training also means that although when judges make decisions they do so in a calculating manner, these calculations take place within perceptual boundaries disciplined to a large extent by their previous training and beliefs. In this sense, and rather than 'following rules', judges (like all of us) act according to an 'embodied understanding' (Taylor, 1995) and they approach texts (again, as all of us do) with a circumscribed capacity to understand that text's meaning(s). Although judicial labour involved in interpreting precedent potentially allows for the radical divergence from past

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ascent as judges in the first place and represents their investment in the field.

court cases, it is generally the case[71] that the opposite happens, that judges tend to render conservative decisions which privilege the existing state of affairs.

This privileging is often the result of the fact that appointed judges "hold an intellectual and emotional commitment to the status quo" (Bell & Asch, 1997: 45). Joel Bakan (1997) makes a similar if more sharply worded point: "education, socialization, and selection of judges ensure that they are likely to value and support existing social arrangements and to stay within the bounds of society's 'dominant views' when deciding cases" (1997: 103). Successful entry into the juridical field and ascension to the relatively prestigious position of judge make this all the more likely. Moreover, due to the structural nature of bias in the judicial system, judges need not let unprofessionalism or 'personal biases' sway their decisions in order to render successive decisions which favour certain groups and marginalize others (1997: 104). Court cases are marked by a certain level of discretion in rendering a correct interpretation, and judges use this discretion to write decisions which tend to reflect existing, dominant societal views and interpretations rather than assist minorities in achieving social justice – all of which occurs within the context of 'appropriate decision-making' rather than 'personal bias'. Thus, the judicial discretion inherent in the use of precedent "allows [judges] to empathize with the discriminatory treatment of Aboriginal people and at the same time declare helpless bondage to the fundamental principles firmly established in the common law" (Asch & Bell, 1997: 45).

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[71] Thus, critical legal theorists are wrong to suggest that because court decisions are not fully determinate they must be indeterminate. Courts are, rather, *under*-determinate, especially in instances for which little precedent exists, but their habitus as judges usually ensure a relatively small range of deviation about what may count as a 'correct' decision (see Macklem, 2001; Solum, 1987).

In addition to precedent and the doctrine of *stare decisis*, juridical reasoning is constrained by the inception of *purposive reasoning*, prominent in the post-Charter courts. This rhetorical device requires the judge to examine "Canada's history, traditions, and fundamental values…to determine a right or freedom's purpose" (Bakan, 1997: 22) and is supposed to act as a governor on judicial choice by limiting decisions to a right's underlying purposes and principles (1997: 23). In a more concrete context however, context-specific and critically important jurisprudential questions revolve around establishing which interests the courts should protect, and how they should protect them (Macklem, 2001: 161). Judges engage in purposive reasoning to establish the underlying purpose or interests the right is meant to protect. The important thing to remember about purposive reasoning, however, is that "the right's purpose does not magically arise from the text and announce its presence to the interpreter" (Macklem, 2001: 164). Instead, the judicial process requires that judges glean it from the array of competing interests and select, through the use of convention, precedent, academic commentary and their own sense of balance, those which intuitively appear correct or reasonable (Macklem, 2001: 164). More often, though, a right is characterized "in the absence of an explicit inquiry into the interests it ought to protect, leaving the reader with the task of discerning the right's underlying interests by comparing the purpose ascribed to the right with the types of activities that it authorizes" (2001: 164). Ultimately then, determinations about the 'which' and the 'how' are predicated upon the right's characterization.

Deciding how to correctly characterize a right, then, requires deciding which interests the right is meant to protect – or to turn the statement slightly, the *kind* of interests protected. For example, although *all* the legal actors in the *Powley* case understood Aboriginal rights as cultural rights, there are various ways to characterize rights depending on the kinds of interests which appropriately warrant protection. Although privileged in this context culturally constructed rights are but one construction. In addition, *civil* and *political* rights might include "freedom of conscience, religion, assembly, association, as well as voting rights and rights associated with a fair trial and equality", while social and economic rights might include "rights to health, education, culture, housing, social assistance, and nutrition." (Macklem, 2001: 239) Civil and political rights protect our participation in civil and political society while social and economic rights protect our economic and social welfare (Macklem, 2001: 240).

These underlying purposes and principles will themselves be anchored in judges' opinions about what counts as valid. Purposive reasoning impacts judicial discretion and is based on what judges think is fair, how they perceive groups and what they think they deserve. In a colonial nation-state like Canada, dominant 'whitesteam' assumptions about race and culture attach themselves to judicial readings of legal texts pertaining to Aboriginal issues based on how these judges perceive Aboriginality and thus, what they think is owed to them. Moreover, this normalized view of fairness is often exacerbated by legal actors who, despite their considerable internal disagreements over points of law, possess (whether consciously or not) allegiance to the same underlying stereotypes of Aboriginality.

Summary:

Positioning the courts as a social field means that we need to understand that legal actors (whether individuals or institutions) *compete* to legitimize their conception of 'law'. Importantly, like all social fields the juridical field is *hierarchically organized*, such that judges possess the greatest amount of capital while lawyers possess less and expert witnesses possess the least. Thus, this competition does not take place on a level playing field. Legal actors possess and struggle for control over judicial *capital*, the substance of law itself. Forming the substance of case law represents both the stakes and the ability to effectively struggle. Successful competition *legitimizes* this substance, and renders it legitimate in the eyes of those who enact it and those who are subject to it. This allows actors to convert juridical capital into other forms.

Importantly, legal actors believe deeply in the juridical field (if not its present form). Thus, the juridical field imposes *specific forms* of struggles on its actors. A crucial form through which struggles ensue is an adherence to the doctrine of *stare decisis*. Although the specific forms of struggle give the field a certain degree of autonomy from competition in other fields, social fields are interlocked by virtue of the fact that agents belong to multiple social fields and that those in dominant positions in one field tend to be similarly positioned in others. Canadian courts' reliance on the doctrine of *stare decisis* allow judges a level of discretion in rendering court decisions. Although in principle this discretion allows for transformations in new areas of case law, by and large its adherence simply reproduces existing jurisprudence. Similarly, although the use of purposive reasoning allows judges to interpret the underlying spirit of laws, they do so within dominant discourses about what (they believe) Aboriginality is.

Additionally, to reiterate the kind of analysis that follows from this discussion, my analytical framework centers on the courts as a *specific, semi-autonomous* and *generative social field*. Regarding the specificity, instead of discussing 'law' as a homogeneous or monolithic entity, I focus on the specific instance of the courts, owing to their tremendous translative power into the Canadian bureaucratic/political field. Moreover, the fact that I focus on all the legal files rather than just the court decisions themselves allows me to mine the creative tensions between the courts and the governmental desires in that I demonstrate the extent to which judicial conclusions differ from those forwarded by the Ontario Crown through its factum. Regarding the autonomy of the courts, I demonstrate (specifically in the next chapter but also in chapters five and six) that court decisions cannot straightforwardly be explained as simply the residual effects of structure nor the determinate result of legal reasoning but rather, the result of distinctive court logics and deeply and more broadly embedded stereotypes about Aboriginality, played out in a context of struggle between legal actors situated within a particular moment.

Finally, my analysis will demonstrate how the effects of court decisions can be positioned in a broader political context to better appreciate how they get taken up in more directly constitutive ways through avenues of legislation building or policy making. Both despite and because of its power, the Supreme Court is, pardon the pun, supremely impractical in the sense that its court decisions rarely come with an operator's manual. It sets into place particular ways of thinking about future struggles between Aboriginal communities and various levels of government but its rarely draws a road map with sufficient detail that legal actors can find their way without disagreement (hence the need for subsequent court decisions).

Owing to some of the common precepts of Foucauldian discourse analysis which happen to dovetail with Bourdieu's own analyses of social fields, the next chapter distinguishes two discursive sites drawn on by legal actors in their perceptions for how to decide cases for Aboriginal people in Canada. These are their internal analyses of precedent and broader stereotypes about who Aboriginal people are and where / how they live real or 'authentic' lifestyles in contemporary Canada.

CHAPTER THREE:

ABORIGINALITY AND THE CANADIAN COURTS

INTRODUCTION

Can Aboriginal communities be Aboriginal without being different? If so, what would this look like in practice? If not, how will these communities sustain themselves in the face of a Canadian nation-state focused on protecting indigenous difference at the cost of their collectivity? The legacy of *R. v. Sparrow* (1990), the first substantive Supreme Court Aboriginal rights case after the *Constitution Act, 1982*, set in motion two possible paths for protecting *Aboriginality*. The first protected Aboriginal *distinctiveness*, creating an autonomous space within which Aboriginal collectives could evolve as self-governing entities to meet their needs as contemporary communities and nations. In other words, it protected Aboriginal *autonomy*. The second path protected only those cultural practices in which most non-Aboriginals would not themselves engage (see Povinelli, 2002). That is to say, this second path protected Aboriginal *difference*[72].

Six years later, through the infamous 'distinctive to an integral culture' test penned in *R. v. Van der Peet* (1996), the Supreme Court chose decisively to protect Aboriginal difference. In doing so it reaffirmed the central place of Aboriginal difference – and thus, colonialism – in the judicial imagination and in Canadian society. In this chapter I discuss *R. v. Sparrow* and *R. v. Van der Peet*, the two court cases most impacting the jurisprudence deemed relevant to arguing *R. v. Powley*. If Bourdieu is correct, an increased formalization of 'legal rules' sharpens the boundaries of social fields and more importantly, more starkly defines the consequences for (and thus unlikelihood of) stepping outside them. The internal court doctrine of Aboriginal rights constitutes an excellent example of these boundaries.

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[72] In a Canadian jurisprudential context, these notions of difference refer specifically to the central and significant pre-contact practices of ancestral indigenous communities – 'distinctive to an integral culture', to use the wording in *R. v. Van der Peet* (1996). In the context of *R. v. Powley*, this amounted to the right to hunt for food.

In the previous chapter I argued that the doctrine of *stare decisis* provides as much uncertainty as it does certainty, since it is a matter of interpretation. Especially in instances where little precedent exists, judges take it upon themselves to craft legal principles through which they can make sense of Aboriginal rights. As we will see, *R. v. Van der Peet* narrowed the principles generated in the *Sparrow* decision to a tiny portion of their potential and named the source of section 35 Aboriginal rights in the distinctive cultural practices in place prior to contact. Michael Asch suggests that the move to cultural rights signaled unwillingness on the part of the Supreme Court of Canada to deal with their (i.e. rights') political nature. This may be so, but an equally important question arises: what made it so easy for them to brand them as cultural rights? There are different kinds of rights – social, economic, cultural – such that their manifestation as cultural rights is not the only logical construction.

That Aboriginal rights were and remain constructed as cultural rights – with the agreement of all legal actors involved – is evidence of the persistence of dominant discourses of Aboriginality as 'cultural'. The more relevant point, however, is that these dominant discourses are not specific to legal actors but instead, similarly affect most Canadians (even Aboriginal people). Indigenous difference, as constructed both in the courts and more broadly in Canadian society, constitutes a powerful discourse for the articulation of Aboriginal legitimacy. This is a key source, in fact, upon which Aboriginal political leaders stake their claims to self government (see Denis, 1997). The argument anchoring this chapter, however, is that the danger in using courts to enact (or prevent) Aboriginal social change is that discourses produced in this forum tend to emphasize cultural difference. Thus, they emphasize historical identities which offer only a partial glimpse of whom Aboriginal communities were and an even smaller picture of who they are today. To the extent that we buy into such discourses, it simplifies the past and unnecessarily complicates the future, because although it may be that all historical accounts are partial, the juridical illumination of indigenous histories involves far more shadow than light. Their interpretive boundaries and perceptual circumscriptions encourage distortions, stereotypes and partial histories which are, though juridical pronouncements, given the status of truth. This forces communities to chase historical shadows that never really were. Yet, while it may seem that they limit how indigenous communities are permitted to be indigenous it simultaneously holds the potential of representing a useful element of larger political strategies.

In theoretical terms, this chapter is premised on the idea that there is no such thing as a 'core' Aboriginal identity. Those searching for a stable nucleus subscribe to what is commonly known as an 'essentialist' conception of identity. Essentialists believe that we can point to an element or core of elements and say "there! *That's* what makes Aboriginal people Aboriginal". The problem with essentialist conceptions is that they assume a broad agreement about which elements are the 'correct' elements to point to and then posit that these elements possess a fairly stable, unchanging character, since changing would lead to a whole series of disagreements about what constitutes change or whether sufficient change has actually occurred to warrant discussion, etc. Having said that, courts are fundamentally premised on an essentialist construction of Aboriginality in which Aboriginals are tagged with a deep and abiding connection to land. The exact form this construction takes in court jurisprudence possesses a structural homology (Bourdieu, 1996: 263) to broader conceptions of Aboriginality which locate their difference as both cultural and geographical. I pursue this discussion through a brief analysis of the Royal Commission on Aboriginal Peoples (1996), a dominant text through (and against) which discussions about Aboriginality take place and are legitimized in contemporary Canada. First, however, I explore the discourses produced in *R. v. Sparrow* and *R. v. Van der Peet*.

PART I

'Casing the Joint': Precedent Relevant to *R. v. Powley*

In the Shadow of Sparrow and Van der Peet

The *Sparrow* and *Van der Peet* Supreme Court decisions mark the boundaries within which *R. v. Powley* was argued at all levels of jurisdiction. In a very literal sense these cases constituted the 'rules of the game' within which Métis Aboriginal rights are considered and represent Canadian law's transformative and status quo tendencies. *R. v. Sparrow* articulated the relationship between Aboriginal rights and broader constitutional principles while the *Van der Peet* decision set out an explicit framework within which Aboriginal rights – those of the Métis included – could be validated.

Aboriginal rights are legal rights which govern the constitutional relationship between Aboriginal peoples and the Canadian Crown (Slattery, 2000: 198). The contemporary recognition of Métis rights is largely rooted in section 35 of the

Constitution Act of 1982 (Gibson, 1996: 273). Because "unextinguished Aboriginal rights...[give] rise to enforceable legal obligations" (Gibson, 1996: 273), determining the basis and scope of these rights provides an opportunity to better understand their relevance for contemporary Métis communities. The doctrine of Aboriginal rights is anchored in the body of customs formulated by early colonial relations between indigenous peoples and the British Crown, as well as basic principles of justice – the latter are particularly important because of the enshrinement of these rights in the *Constitution Act of 1982* (Slattery, 2000: 199). In chapter five and six I discuss this issue in some length because it underscores the interpretations and purposive reasoning which characterize judicial ruminations in the *Powley* decision.

R. v. Sparrow

In *R. v. Sparrow* (1990), the Supreme Court of Canada justices laid out an interpretive test for analyzing Aboriginal rights. The Supreme Court justices argued that "the phrase "existing Aboriginal rights" must be interpreted flexibly so as to permit their evolution over time....Clearly...an approach to the constitutional guarantee embodied in section 35(1) which would incorporate "frozen rights" must be rejected" (*R. v. Sparrow*, 1990: 171). That is to say, Aboriginal rights could not be frozen at some historical moment in time so as to prevent their evolution; a reconciliation of government power with government obligations and duties to Aboriginals meant that these rights could not be based on (stereotypical representations of) who Aboriginals were thought to be in the past.

They argued further that the "nature of s.35(1) itself suggests that it must be construed in a purposeful way". Purposive reasoning, discussed earlier in chapter two, requires that "[w]hen the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded" (1990: 179). Moreover, comprehending Aboriginal rights through the lens of section 35 demanded that judges be "sensitive to the aboriginal perspective itself on the meaning of the rights at stake" (1990: 182). In addition, however, the *Sparrow* decision explicitly brought the constitution rights of Aboriginal people under Canada's control by defining them as common law rights and as such subject to Canada's sovereignty (*R. v. Sparrow*, 1990: 177, 181; see Asch & Macklem, 1991).

The original test laid out in the *Sparrow* decision required an Aboriginal litigant to show evidence that they were acting pursuant to an Aboriginal right, that the Crown had not extinguished that right prior to 1982 and that current government regulation of the right was unjustified (i.e. was the limitation unreasonable? Did it impose undue hardship? Did it deny the right-holder the preferred means of exercising the right?) If the Aboriginal litigant was able to prove this claim, the onus switched to the Crown to prove that their infringement on the right was justified. In demonstrating its justification, the Crown was required to show a valid and specific legislative objective ('public interest' was deemed too vague while 'conservation' was not) (see Bell, 1998).

More symbolically, however, section 35 held a broader purpose. It raised the stakes because government obligations were no longer simply a matter of political expedience, but rather were legal obligations enshrined in Canada's constitution. Noting that Canada had little to be proud of in its past treatment of Aboriginal people and that as often as not their rights were honoured in the breach, the Supreme Court of Canada argued further that section 35 was the culmination of a long and hard-fought struggle by Aboriginal people, both in the courts and in the legislature. As such, section 35 should provide "a solid constitutional base upon which subsequent negotiations can take place". Symbolically, section 35 thus "call[ed] for a just settlement for aboriginal peoples. It renounce[d] the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown" (*R. v. Sparrow*, 1990: 1106). Likewise, although Aboriginal rights were not absolute and could be infringed upon by the Canadian government, this infringement had to meet with the high standards of the justification test mentioned earlier. Only this would fulfill the fiduciary relationship which properly characterizes the constitutional relationship between Aboriginal people and the Canadian state. Moreover, the Supreme Court of Canada took this opportunity to set themselves up in a tension against the Canadian parliament – section 35 was thus to be used by Aboriginal groups as a tool to ward off or fight against the untrammeled political divesting of their rights by the Canadian Crown.

Sparrow was the first Supreme Court of Canada case to directly apply principles of constitutional law to Aboriginal rights and perhaps predictably, it raised as many questions as it answered. Of particular relevance here is Bell's (1998) query, written as though *Van der Peet* (1996) had not yet transpired:

> Is *Sparrow* a precedent for rejecting the process of freezing Aboriginal rights; that is, does *Sparrow* reject limiting contemporary Aboriginal rights to the exercise of practices at the date sovereignty was asserted, or does adoption of the interpretive principles in *Sparrow* call for recognition of more abstract fundamental rights which can be exercised in modern ways (1998: 43-4)?

The answer to Bell's questions lays in the interpretive constraints underlying the purposive reasoning emphasized in the *Sparrow* decision. *Sparrow* merely provided a canvas, however, although one upon which one could conceive of a broad spectrum of colours in the pallet; the *Van der Peet* decision was to narrow considerably this conception and those colours.

R. v. Van der Peet

Van der Peet – the majority

Six years after the *Sparrow* decision, the Supreme Court of Canada rendered the next significant decision with respect to Aboriginal rights in *R. v. Van der Peet* (1996), a decision which shredded the liberal constitutional principles applied in *Sparrow* and left no doubt about the place of Aboriginal rights (and, by association, Aboriginal societies) in the judicial imagination of the Supreme Court of Canada. The majority of the *Van der Peet* court argued that "[s]ection 35(1), it is true, recognizes and affirms existing Aboriginal *rights*, but it must not be forgotten that the rights it recognizes and affirms are *Aboriginal*" (*R. v. Van der Peet*, 1996: 189-90 – emphasis in original).

The obvious question which arises from this statement is what, exactly, was the provision intended to protect? The problem, as the *Van der Peet* court characterized it, was how to "define the scope of s.35(1) in a way which capture[d] *both* the Aboriginal and the rights in Aboriginal rights" (1996: 190 – emphasis in original). Aboriginal rights cannot, after all, be interpreted in the same manner as universal rights since, by their very characterization as *Aboriginal* rights, they are not universal and thus, presumably, do not protect the 'inherent dignity' of indigenous citizens of Canada in the same way that abstract liberal rights protect non-indigenous citizens (*Van der Peet*, 1996: 190). Therefore, or so the Supreme Court's judicial reasoning went, the responsible fulfillment of section 35 had to focus on the correct characterization of the claim (1996: 202) and a determination of whether the practice, custom or tradition was "integral to the distinctive culture of the Aboriginal group claiming the right" (1996: 201).

More completely, the majority decision of *Van der Peet* (I discuss the minority decisions below) imposed a ten part test for determining the validity of section 35 Aboriginal rights claims. These included: 1) the correct characterization of the right; 2) the identification of a historic rights-bearing community; 3) the identification of a contemporary rights-bearing community; 4) the identification of the relevant time frame; 5) the proof of membership in the relevant contemporary community; 6) the determination of the significance of the right to the Aboriginal society in question; 7) the demonstration of continuity between historical practice and the contemporary right asserted; 8) the determination of whether or not the right was extinguished; 9) the determination of infringement (as per *Sparrow*); and 10) the determination whether the infringement is justified (para. 50-60). This dissertation focuses on two of these ten elements; the determination of a relevant time frame and proof of membership in the relevant community because, in my opinion, these two elements most directly demonstrate the sensibilities of racialization anchored in the imposition of colonial relations onto indigenous peoples in Canada.

The *Van der Peet* court stated that "the test for identifying the Aboriginal rights recognized and affirmed by s.35(1)[…]must[…]aim at identifying the practices, traditions and customs central to the Aboriginal societies that existed in North America *prior to contact* with the Europeans" (*R. v. Van der Peet*, 1996: 200 – emphasis added). "[I]t is the fact that distinctive aboriginal societies lived on the land prior to the arrival of Europeans that underlies the aboriginal rights protected by s. 35(1), it is to that pre-contact period that the courts must look in identifying aboriginal rights (para. 60). Similarly,

> The fact that the doctrine of aboriginal rights functions to reconcile the existence of pre-existing aboriginal societies with the sovereignty of the Crown does not alter this position. Although it is the sovereignty of the Crown that the pre-existing aboriginal societies are being reconciled with, it is to those pre-existing societies that the court must look in defining aboriginal rights. It is not the fact that aboriginal societies existed prior to Crown sovereignty that is relevant; it is the fact that they existed prior to the arrival of Europeans in North America. As such, the relevant time period is the period prior to the arrival of Europeans, not the period prior to the assertion of sovereignty by the Crown (*R. v. Van der Peet*, 1996: para. 61 – emphasis in original).

Thus, the majority in *Van der Peet* arrives at the opinion that the purpose of section 35 is twofold: 1) to recognize the pre-contact occupation of Aboriginal people; and 2) to reconcile that with the realities of Crown sovereignty. These encapsulate the meaning with which 'Aboriginality' is imbued by the courts. The majority in *Van der Peet* constructed Aboriginal rights as a means for protecting that which makes Aboriginal people truly different – that which no other Canadians can share. Perhaps simply enough, they came to the conclusion that this difference is most starkly encapsulated in the one fact which separates Aboriginal people from all other Canadians – they were here first.

Of course, the *Van der Peet* court was caught on the horns of a dilemma – Métis, although included in section 35 of the *Constitution Act*, are by definition a post-contact Aboriginal people. Didn't the *Van der Peet* framework effectively exclude the Métis from sharing in the protection afforded by section 35? The *Van der Peet* court answered in the negative. The inclusion of the Métis in section 35 is, they argue, different from that of Canada's other Aboriginal peoples, therefore the exact protection afforded by section 35 will differ with respect to the Métis as will the test used to determine the validity of their section 35 claims. The Supreme Court of Canada did suggest, however, that "[i]t may, or it may not, be the case that the claims of the Métis are determined on the basis of the pre-contact practices, customs and traditions of their aboriginal ancestors; whether that is so must await determination in a case in which the issue arises" (*R. v. Van der Peet*, 1996: para. 47). This possible construction of Aboriginality – Métis as derivative of First Nations antecedents – finds its way into the factums at both the Appeal Court of Ontario and the Supreme Court of Canada level of the *Powley* case.

Van der Peet – the Dissent(1) (Justice L'Heureux-Dubé)

In her dissent, Supreme Court Justice Claire L'Heureux-Dubé disagrees with a point-of-contact test for determining the authenticity of section 35 right, for three reasons. First, because the point of contact vastly overstates the impact of European arrival on existing indigenous societies; second, because in some cases it would make the date of determination extremely difficult to pinpoint, forcing claimants to "embark upon a search for a pristine aboriginal society…"(*R. v. Van der Peet*, 1996: para. 168); finally, given that Métis are included in section 35 of the *Constitution* and that section 35 assumes no hierarchy of rights between Métis, Indians and Inuit, the protection of Aboriginal practices which arise after contact must be included to ensure the proper protection of Métis practices (para. 169).

Additionally, L'Heureux-Dubé argues that a properly purposive approach to section 35 must allow for Aboriginal practices to evolve over time. Therefore, as long as the Aboriginal collective remains intact, and as long as the practice in question was a central and significant part of the society (say, 20 to 50 years), then the exact nature or origins of the practice is irrelevant. Referring to this model as a 'dynamic rights' approach, L'Heureux-Dubé suggests its advantage over what she refers to as the "frozen rights" approach advocated by the majority in *Van der Peet*:

> It recognizes that distinctive aboriginal culture is not a reality of the past, preserved and exhibited in a museum, but a characteristic that has evolved with the natives as they have changed, modernized and flourished over time, along with the rest of Canadian society (para. 179).

Aside from the philosophical discussions pertaining to finding centrality in culture (see Barsh & Youngblood-Henderson, 1997), what L'Heureux-Dubé is really arguing is that the rights divest in the collective, not in the practices themselves. Thus, as long as the collective remains intact, the practices themselves should be allowed to evolve. Likewise, as long as the practices constitute an important part of the Aboriginal community in question and over a reasonable amount of time, what they consist of is irrelevant.

Van der Peet – the Dissent(2) (Justice McLachlin)

For her part, Supreme Court Justice Beverley McLachlin begins her dissent by suggesting that the recognition of section 35 Aboriginal rights must be in accordance with what previous case law has recognized, namely "the right to be sustained from the land or waters upon which an aboriginal people have traditionally relied for sustenance" (para. 227). Likewise, the right is ultimately limited to the Aboriginal community's historic use of the right (para. 227). That said, she nonetheless disagrees with the majority decision because, as she argues, it marginalizes the extent to which Aboriginal rights are based not just in pre-contact Aboriginal occupation but in pre-contact Aboriginal legal regimes. Moreover, the promise of section 35 requires that the Crown reconcile with these pre-existing occupations and legal regimes in a way that "provides the basis for a just and lasting settlement of aboriginal claims consistent with the high standard which the law imposes on the Crown in its dealings with aboriginal peoples" (para. 230).

It is in this context that any test for section 35 Aboriginal rights must be constructed. McLachlin argues specifically that a section 35 test must bear in mind the high standard of duty and care owed to Aboriginal people (which means the preclusion of the extinguishment of their rights), is thus liberal and generous towards the Aboriginal litigant community and most importantly for our purposes, "considers the aboriginal claim in the context of the historic way of life of the people asserting it" (para. 232). This perspective is crucial to the ability of common law to accord proper respect to the Aboriginal people's pre-existing legal regime (para. 234).

McLachlin states however that unlike L'Heureux-Dubé, she cannot ignore history. A recently adopted tradition would not, therefore, qualify as an Aboriginal right because, she tells us, Aboriginal rights are always a question of origins and thus the Supreme Court of Canada has always emphasized an exploration of those origins (para. 246). Neither, however, can she find jurisprudence to suggest that the moment of contact constitutes an appropriate time frame for the consideration of section 35 rights. "One finds no mention in the text of s. 35(1) or in the jurisprudence of the moment of European contact as the definitive all-or-nothing time for establishing an aboriginal right" (para. 247). Instead, a grounded interpretive approach needs to look to the historical legal regimes of the Aboriginal community in question prior to their dissolution by the imposition of colonial law. "What must be established is continuity between the modern practice at issue and a traditional law or custom of the native people" (para. 247).

> My concern is that we not substitute an inquiry into the precise moment of first European contact -- an inquiry which may prove difficult -- for what is really at

> issue, namely the ancestral customs and laws observed by the indigenous peoples of the territory. For example, there are those who assert that Europeans settled the eastern maritime regions of Canada in the 7th and 8th centuries A.D. To argue that aboriginal rights crystallized then would make little sense; the better question is what laws and customs held sway before superimposition of European laws and customs. To take another example, in parts of the west of Canada, over a century elapsed between the first contact with Europeans and imposition of "Canadian" or "European" law. During this period, many tribes lived largely unaffected by European laws and customs. I see no reason why evidence as to the laws and customs and territories of the aboriginals in this interval should not be considered in determining the nature and scope of their aboriginal rights. *This approach accommodates the specific inclusion in s. 35(1) of the* Constitution Act, 1982 *of the aboriginal rights of the Métis people, the descendants of European explorers and traders and aboriginal women* (para. 248 – emphasis added).

Having said this, McLachlin is quick to point out that these rights, although they must somehow be imbedded in pre-existing (though not necessarily pre-contact) traditions and practices, must be allowed to evolve over time. Failing to allow this "is to deny the reality that aboriginal cultures, like all cultures, change and adapt with time" (para. 250).

Ultimately, however, although McLachlin fundamentally disagrees with the majority decision in the *Van der Peet* decision that the point of contact constitutes the appropriate date for assessing the distinctiveness of Aboriginal rights, she still looks to the past in her construction of Aboriginal rights. Her version of section 35 rights is, she tells us, anchored explicitly in a sensibility familiar to common law. Namely, 'what has the law allowed in the past?' She concludes that the spirit and intent of the law (if not the shortsightedness of colonial administrators) allowed Aboriginal communities communal use of their lands, waters and resources. This sensibility can serve as a guide for which contemporary rights may be protected under section 35, as "[i]t is supported by the common law and by the history of this country. It may safely be said to be enshrined in s. 35(1) of the *Constitution Act, 1982*" (para. 275).

Summary:

Three points of application emerge from *R. v. Van der Peet*'s majority and dissenting opinions. 1) *point of contact* – section 35 is meant to protect what is truly different about Aboriginal communities: certainty of this difference requires finding a point in time where no European influences can interfere. This was constructed as the point of contact between European and indigenous peoples. 2) *Pre-imposition of colonial regime*: Aboriginal rights find their source not in some magic moment in time, but in the traditions and practices which made them distinctively Aboriginal. The purpose of section 35 is to protect those practices and traditions which were in place prior to the imposition of a colonial regime. 3) The purpose of section 35 rights is to *protect practices distinctive to Aboriginal cultures*. Like all cultures, Aboriginal cultures change over time; thus, the exact practice in question is irrelevant. The requirement need only be that a particular practice is deemed central and significant to the Aboriginal community in question, and that it has been around for at least several generations.

Clearly, each of the opinions declared a very different application of the *Sparrow* decision and presented starkly differing conclusions on what purposive reasoning might entail. Yet, L'Heureux-Dubé's progressive reasoning aside, Aboriginal rights jurisprudence is trapped in a paradigm which views authentic Aboriginality as that which characterized historical Aboriginal communities. This does not necessarily make for bad law. Indeed, the most progressive social commentators on Aboriginal rights normally tangle with specific historical dates rather than the idea of using history altogether. As I discuss in the second half of this chapter through an exploration of parts of the Royal Commission on Aboriginal Peoples, such imagery as that constructed in common law jurisprudence does not differ starkly from other conceptions of Aboriginality. In fact, the symbolic power of law is such that it may actually assist in the inculcation of these discourses in the broader public.

PART II

Aboriginal Difference: A Dominant Discourse

As critics and pundits alike are fond of pointing out, the 1996 Royal Commission on Aboriginal Peoples (hereafter RCAP) is the largest, most extensive and expensive public inquiry undertaken in Canadian history. It included interviews with Aboriginals from all over Canada, with a price tag reaching upwards of sixty million dollars. Moreover, never before has a royal commission involved so many Aboriginal people at such high decision-making levels: Georges Erasmus, for example, was chosen as one of the commission's co-chairs and other noted Aboriginal individuals held various positions in the upper echelons of the commission. As with most inquiries, the RCAP Report, in its final version, condensed thousands upon thousands of interviews and scholarly submissions into five concentrated volumes - this winnowing process was fraught with all the same give-and-take negotiations that characterize the Canadian government's relationship with Aboriginal peoples. As has happened before,[73] more radical Aboriginal views were marginalized in favour of moderate ones.

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[73] See the Canadian government's treatment of Aboriginal women's concerns during the 1982 Constitution talks (Green, 1993). In addition, see Sawchuk (1998) for a discussion of the ways in which the federal and provincial governing bodies discipline Aboriginal political organizations.

This being the case, what is the importance of such a public inquiry? According to Ashforth (1990), the importance of public inquiries (as state legitimation projects) lies not in their content (for many of the same reasons listed above), but in their form (1990: 3). Public inquiries are symbolic rituals that uphold the distinction between the state and society, such that they are "part of the process of inventing the idea of the State as a particular form of instrumental rational practice the purpose of which is largely to solve 'problems' of Society" (1990: 4). Surely it is no surprise that public ritual is an integral element of state legitimation – the importance of ritual is characteristic of both pre-modern and modern states. For example, Foucault (1977) describes how state-sanctioned executions in pre-modern societies were constructed to demonstrate the full power of the sovereign. Hobsbawm and Ranger (1983) argue that the purpose of rituals in much of modern state formation is to instill certain values, norms and behaviours through repetition, and are 'invented' (in some cases) for very particular purposes. Weber (1982) shows the very deliberate public ritualization processes carried out by the French state to turn their 'peasants into Frenchmen'. Part of this ritualization is today carried out in public inquiries.

When Commissions are struck, the very terms of reference that constitute them and the nature of their investigation produce a legitimating discourse of the state. By virtue of their arms-length relationship with government, public inquiries wear a cloak of impartiality, reaffirmed by the appointing of non-government personnel to carry them out. The function that public inquiries are seen to perform then, is to set up a dialogue between state and society. Public inquiries mediate between the state and society; they listen to society and speak on behalf of the state (Ashcroft, 1990: 9). It is in this way that the claimed neutrality of "the state" is maintained, that "the state" is kept above the fray of society (1990: 5). Hence, the idea of the neutral state is continually reinvented, to 'solve' the problems of society (1990: 4).

Extending Ashforth's (1990) argument slightly, another important element of public inquiries is not just their form, but the form of their content. When the public inquiries speak on behalf of the state, their language is an intricate marriage of truth and power. In other words, public inquiries do not just gather facts; they authorize certain forms of social discourse, which ultimately become *truths*, precisely because of the supposed neutrality of the inquiries themselves. These truths are incorporated as an important source of historical dialogue – foundation stones of the 'official' history of every (new) nation. In this way, the RCAP Report derives its legitimacy from its supposed impartiality. This impartiality hinges on maintaining a distinction between the state and civil society. The rest of its authority rests on its much vaunted exhaustiveness. The RCAP Report no longer simply reports the facts; it is now establishing the *truth*. Indeed, it is in this sense that it is routinely said that no credible discussion of Aboriginal issues is possible in Canada unless it takes full account of the RCAP Report[74].

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[74] Parts of this and the next several pages have already been published in Andersen, C. & C. Denis (2003) "Urban natives and the nation: before and after the Royal Commission on Aboriginal Peoples." *Canadian Review of Sociology and Anthropology*. 40(4): 373-390. I have received permission from both Claude Denis and the Canadian Review of Sociology and Anthropology to reproduce the material in the dissertation (it was originally written by me for the dissertation).

Indeed, the Royal Commission's findings and the series of recommendations generated in the report are supposed to serve an important public education function. One recommendation in particular is that RCAP demonstrate a broad public education role:

> By public education we mean activities that can help increase public awareness of Aboriginal issues and contribute to reconciliation and understanding. They include news coverage and media activity of all sorts; conferences and seminars; awareness activities in schools, workplaces and communities and in local and national organizations; the use of symbols and cultural activities; and special initiatives such as exchanges between families, communities and associations and twinning between Aboriginal and non-Aboriginal communities or organizations (RCAP, 1996, vol. 5: ch. 4).

Similarly, RCAP suggests that some chapters in particular, especially the chapters on residential schools in volume 1 and on treaties in volume 2, comprise a core element of grade school curriculum in Canadian schools. Likewise, both I and many of my colleagues teaching Native Studies courses have incorporated chapters of the report into our course curriculum.

More specifically, both research appearing in the final report as well as other research commissioned as part of the larger corpus of documents through which the final report was written, played a prominent role in the *Powley* decisions. Not only was it used by the various court justices writing the decisions in exactly the same manner as peer-reviewed published research, it was also used by various interveners (especially the Aboriginal interveners) both as a resource of Métis history and as a source for fashioning a workable Métis definition for the purposes of section 35 rights. In fact, the Supreme Court of Canada employed a variation of the Métis definition originally constructed in RCAP. Moreover, one intervener was concerned enough about the likelihood of the courts incorporating logics found in the Royal Commission that it took the time in its factum to criticize it as a political, rather than scholarly, document.

> It is submitted that while this report provides an important contribution to the political discourse concerning the place of Aboriginal peoples in contemporary Canadian society, it cannot be relied upon as a source of historical evidence in legal proceedings. Historical facts referred to in the report cannot be assumed to be true and *must be proven in the ordinary way* (Attorney General of Saskatchewan Factum, 2002: para. 48 – emphasis added).

All of this is to say that public inquiries in general and the Royal Commission on Aboriginal Peoples in particular constitute an appropriate avenue for exploring dominant discourses about Aboriginality in Canada.

'Landed' Aboriginality

The RCAP Commissioners' construction of Aboriginality is far from unitary. Likewise, the report's preoccupation with land cannot be understood without a discussion about how the Commission's authors position indigenous difference more broadly. RCAP suggests that historically, understandings of indigenous culture were predicated on grammars of race and culture. They argue that this hierarchy of difference is constitutive of Western (*modern*) culture, which is and has always been predicated on an understanding of difference in which the "other" ("the Indian") is not just *different* but *lesser* (RCAP, 1996, Vol. 1: 45; Vol. 4: 45). Thus, part of RCAP's focus is to demonstrate the extent to which such historical differences were not lesser but merely different.

In chapter one of volume one of the report the authors begin by noting the differences between Aboriginal and non-Aboriginal conceptions of history: non-Aboriginal history is secular and represents an attempt to 'find out what really happened' through a compilation of historical facts. Moreover, non-Aboriginal historical methodology tends to separate the secular from the spiritual, facts from values. Finally, humans represent the centerpiece of investigation. In contrast, according to RCAP Aboriginal history is non-linear, makes no separation of the secular and the spiritual, and humans are but one element (and not necessarily even the most important one) in the larger scheme of things. Historical narrative in Aboriginal tellings of history explicitly binds teller(s) and listener(s) together while the past, far from constituting a distant entity, comes alive in the relationship between teller and listener. Likewise, Aboriginal history is moored strongly to specific geographical areas, such that they are necessarily local and necessarily demonstrate the deep and abiding relationship that Aboriginal people hold not only to land but to place. "This contributes to a sense that there are many histories, each characterized in part by how a people see themselves, how they define their identity in relation to their environment, and how they express their uniqueness as a people" (RCAP, 1996, vol. 1: ch. 1).

In short, while non-Aboriginal history consists of an exercise of collecting facts in the linear pursuit of finding out 'the truth' about the past, Aboriginal history is said to be non-linear and assumes that no two historical narratives will be alike, that the teller is a powerful part of the history itself. Likewise, stating that Aboriginal history is non-linear means that its telling, since it is oral and local, plays a much stronger role in tying community members into the past, the land and the environment. More importantly, 'the past' is never a disembodied entity in Aboriginal history but instead is brought to life though the telling such that community members are made aware and socialized into their position in relation to their ancestors, their family, future generations and the land. Such pronouncements are buttressed repeatedly by quotes from individuals who attended public sessions. For example: "“[s]ome of the old people...talk about the water...and it is really nice to hear them talk about the whole cycle of water, where it all starts and where it all ends up" (Chief Albert Saddleman, Okanagan Band. Kelowna, British Columbia, 16 June 1993 in RCAP, 1996, vol. 1: 36).

From the outset the report elaborates on the deep differences that characterize Aboriginal and non-Aboriginal histories, communities and 'being', an elaboration that sets the tenor for the rest of the report. These differences underscore everything written in the report. In fact, to the extent that Aboriginal people do not believe in or emphasize these differences is presented in some contexts as evidence of colonialism trauma. Moreover, the Commissioners buy very strongly into discourses about pre-contact authenticity of Aboriginality, in that large parts of the first chapter of volume one are dedicated to an elaborate discussion of the characteristics of five different indigenous nations at (and thus prior to) contact.

One of the many supposed differences between Aboriginal and non-Aboriginal people is a deep and abiding (spiritual, even) connection to land or more specifically, place. According to RCAP, it touches every part of life for Aboriginal people.

> The way people have related to and lived on the land (and in many cases continue to) also forms the basis of society, nationhood, governance and community. Land touches every aspect of life: conceptual and spiritual views; securing food, shelter and clothing; cycles of economic activities including the division of labour; forms of social organization such as recreational and ceremonial events; and systems of governance and management (RCAP, 1996, vol. 2(2): 448).

Thus, as part of their focus the RCAP Commissioners argue that they must "examine how land is reflected in the language, culture and spiritual values *of all Aboriginal peoples*"

(RCAP, 1996, vol. 2(2): 425 – emphasis added). Of course, this quote can be read a number of ways, one of which requires that the Commissioners take seriously the entire gambit of Aboriginal cultural and spiritual values to understand how relationships to land are reflected in them, rather than pre-supposing this deep and abiding relationship. Instead, the Commissioners argue that although these values and their attendant "concepts of territory, property and tenure, of resource management and ecological knowledge may differ profoundly from those of other Canadians… they are entitled to no less respect" (RCAP, 1996, vol. 2(2): 425). Thus, to Aboriginal people "land is not simply the basis for livelihood but of life and must be treated as such" (vol. 2(2): 448), and as such the Commissioners argue that any self-government agreements reached between Aboriginal people and the Canadian state must include a link to land and resources (vol. 2(2): 422).

In an interesting contrast, although the Commissioners note the large migration by Aboriginal people to cities (for better living conditions, for education, to find employment, etc.), they suggest that reserves, settlements and otherwise rural places (i.e. those close to the land) still remain the heartland of Aboriginal culture and as such, a 'home' where the "desire to return is deeply rooted" (vol. 2(2): 451). Concomitantly, the Commissioners view urban centres as quintessentially *non*-Aboriginal spaces (see vol. 4, ch. 7 of the RCAP Report). It would be unfair, however, to leave the reader with the impression that the Commissioners simply dismissed urban issues as an afterthought—the issue is more complex. In their chapter on urban issues, the authors make a sincere attempt to place urban people into a nation-based governance context. Yet, it is clear that the RCAP Report suggestions are firmly planted in the idea that Aboriginal nations are located in "traditional" home communities, such that urban communities themselves are not presented as legitimate alternatives, despite the fact that for the first time in Canada's history more Aboriginal people live in cities than anywhere else (see Statistics Canada, 2003).

> [M]aintaining cultural identity requires creating an Aboriginal community in the city. Following three decades of urbanization, *development of a strong community still remains largely incomplete.* Many urban Aboriginal people are impoverished and unorganized. No coherent or co-ordinated policies to meet their needs are in place, despite the fact that they make up almost half of Canada's Aboriginal population. They have been largely excluded from discussions about self-government and institutional development. Aboriginal people in urban areas have little collective visibility or power (RCAP, 1996, Vol. 4: 531 – emphasis added).

Moreover, their approaches to urban governance take as their origin urban Aboriginal peoples' nations of origin (1996, Vol. 4: 588). In fact, the writers of the urban chapter largely avoid referring to urban Aboriginal "communities" at all—rather, they use "Aboriginal people in urban areas" (1996, Vol. 4: 520)[75].

Summary

The point of this chapter was to elaborate two discursive sites through which Canadian judges are likely to make sense of the *Powley* decision – relevant precedent regarding Aboriginal rights, and stereotypical notions of Aboriginality such as those contained in the Royal Commission on Aboriginal Peoples. My argument is that both the Appeal Court for Ontario and the Supreme Court of Canada chart their course using the signposts provided by the earlier *Van der Peet* decision. Equally importantly, however, the dissents in *Van der Peet* demonstrated the discursive instability of the decision's major findings with respect to the specific case of section 35 Métis rights.

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[75] See Andersen & Denis (2003) for a discussion of the impact of these discourses on contemporary Aboriginal nationhood projects.

Likewise, through an explanation of the RCAP Report, I positioned dominant perceptions of Aboriginality as fundamentally different in the context of their relationship to land. This report is helpful in this regard as it contains a succinct encapsulation of these underlying sensibilities about Aboriginality which are, I think, more broadly held by Canadians. Interestingly, as we will see, the judges rejected (although not entirely) a third discourse, that Métis is coterminous with 'mixed' – in fact, the Supreme Court resoundingly rejected it in favour of a decision which positioned the Métis litigants as 'fully Aboriginal'. How, exactly, they accomplished this and the discursive waters within which they were moored in doing so, is the subject of the methodology chapter, which I turn to now.

CHAPTER FOUR

METHODOLOGY

INTRODUCTION

Chapter one introduced some of the conceptual issues underlying this research. In particular, it was argued that constructions of Métis as 'mixed' plagued historical bureaucratic attempts to colonize indigenous communities which resulted in unstable and arbitrary categorizations based on lifestyle suitability criteria in addition to racial characteristics. This instability continues to mire contemporary discourses both about what it means to be Métis and how Métis are indigenous. Ultimately, the point of chapter one was to situate Métis identities in the larger context of indigenous claims to legitimacy, to demonstrate their uneasy fit and to situate the reader with respect to the juridical constructions that immediately follow this chapter.

Chapter two positioned the courts as a social field. It began by focusing directly on two distinct bodies of 'law and society' literature, critical legal theory and critical race theory. I argued that although critical legal theory is useful in its construction of 'law' as fundamentally political, it suffers from its reliance on an overly institutionalized and thus, overly essentialist conception of courts as instruments of (class) oppression. Similarly, it fails to account for the racism which characterizes the logic of court decisions focusing on minority issues. Critical race theory represents a theoretical step forward for the present research, in two respects. First, it places race front and centre in its discussion of 'law' – situating racism not as something abhorrent or peripheral to legal reasoning but rather as 'business as usual'. Equally importantly, it demonstrates the ambivalence of

'Law' as an arena of struggle which possesses the ability to either open up or cut off avenues of progressive social change. Thus, 'Law' is neither uniformly oppressive nor liberating – rather, its ambivalence carries within it both the hopes and fears of minority litigants. At the present moment, it gives rise to more hope than fear.

The second half of chapter two situated the courts as a social field – this fragments notions of a uniform, unified 'Law' into a series of interlocking fields. Although these fields are not completely autonomous, they possess a considerable degree of internally specific embodied practices and understandings that render wholly 'external' analyses problematic. The chapter also singled out the importance of precedent in legal reasoning and how, although it allows as much for uncertainty as certainty, it is used by judges to reproduce relations which disadvantage Aboriginal communities. Ultimately, the point of this chapter was to lay out the construction of the courts in a way which allowed for an empirically richer and methodologically more sophisticated analysis of court materials.

This chapter was followed by a discussion of the internal rules and practices which signpost juridical actors' construction of section 35 Aboriginal rights. In particular, it was argued that two key Supreme Court of Canada court decisions – *R. v. Sparrow* and *R. v. Van der Peet* – set the standards for a juridical discussion of the purpose and framework of section 35 Aboriginal rights. I argued further that these two cases present a construction of Aboriginality as 'long ago, far away', a construction made possible by a configuration of precedent *and* stereotypical understandings of what makes Aboriginal people Aboriginal. Such stereotypical constructions are made not just by the uninitiated or ignorant, but also form a important part of how academia has constructed Aboriginality.

This chapter consists of a methodological discussion of this research. My research possesses three analytical keys which, taken together, make it distinctively different from most research on 'law and society' and thus offers a unique perspective. First, it provides a method to account for the combined influence of both internal and external factors on the production of juridical texts. That is to say, it takes legal actors' own framing of the issues seriously, yet also provides an 'outsider's' view which demonstrates the gaps and silences which characterize insider views. Likewise, it takes seriously Bourdieu's insistence that we cannot assume that forms of domination outside the juridical field automatically translate into identical or even similar forms of domination within it. This constitutes an important departure from critical legal and critical race theorists' constructions of 'law'. As it is situated here, 'law' is not, to use a tired crit refrain, straightforwardly politics by other means, if by this phrase we mean to privilege form over content. As with all social fields, there is something unique and irreducible about the courts' dynamism which requires explanation. In Bourdieu's explanation, broader relations of inequality cannot be assumed in explaining results of struggle within (and between) social fields. Struggle and outcomes result from an intersection of one's position both within and outside the social field of the courts.

Second, however sophisticated we get in our investigation into judicial reasoning, the shortcoming of conflating the entirety of 'law' or even a judicial decision with judicial reasoning alone is obvious. Simply put, and despite the fact that this goes against its tacit acceptance by a majority of legal articles, judges do not render decisions out of whole clothe. Thus, to *only* read the judicial decision is to miss the struggles and competition within which the judge was situated when rendering it. In addition to their own judicial sensibilities, judges are disciplined by the parameters of the materials presented to them: court testimony by plaintiffs, defendants and expert witnesses, relevant precedent, evidence and factums, in addition to their own intuitions about fairness and 'common sense', as well as pressure from public opinion and media. Although I am in perfect agreement with the argument that judges play a powerful – dominant, even – role in shaping court decisions, my point is that they are disciplined by issues and texts beyond their own intuitions. Courts represent hierarchical arenas of struggle within which legal actors *compete* to impose their version of 'law' and thus, to only analyze the court decision is to miss an important part of the story.

The third analytical key is that feminists, gays and lesbians as well as ethnic minorities (a distinctive one of which is Aboriginal) have demonstrated the trials and tribulations of using law as a tool for social change. The present research frames this issue in a more Bourdieu-oriented vocabulary to speak about the link between the juridical and bureaucratic field and the possibilities of translating juridical into bureaucratic capital. Court decisions are rarely 'winner take all' events – victories are a shot in the arm, not a life support system while losses, although dampening, are rarely fatal. Win or lose, they need to be understood in the larger context of political action, regardless of whether a particular case started the action or whether it functioned as an element of explicit pre-existing political strategy. This dissertation, although it focuses mainly on internal juridical discourses, also examines (although to a lesser extent) the impact of court decisions and *Powley* within external Métis political movements[76].

In examining the *Powley* court case files, it has been difficult to resist the temptation to 'play lawyer'. Assessing the internal logic or consistency of legal facts and statements (on either side), rather than making sociological observations about the way concepts are employed, is a trap easily fallen into, given to extent to which 'doing sociology' requires a fairly good grasp of the Supreme Court of Canada case law pertaining to Aboriginal rights. In doing so, we like to think that we attain a certain 'feel for the game' regarding how precedent and the 'purposive reasoning' required by constitutional jurisprudence will be enacted, what is considered 'fair', 'logical' or out of bounds. However, as my lawyer and law-student friends never tire of telling me, I am not a lawyer, nor do I have any formal legal training. Hence, answering legal questions, regardless of how fascinating they are from a jurisprudential standpoint, is best left to the experts.

Given my sociological training, however, I can make reference to the kinds of discourses legal actors take for granted and the discursive frameworks within which particular statements 'make sense', because it is equally true that whether or not they are aware of it, lawyers and judges engage in amateur sociological analysis with a comparatively equal lack of 'feel for the sociological game'. In fact, one of the most frustrating (and interesting!) aspects of this dissertation involves ferreting out the implicit assumptions contained in legal actors' analysis of juridical logics. To provide just one of many examples, the Attorneys-General's use of a dictionary to provide a definitive statement about the meaning of the term 'Aboriginal', as though a dictionary was a disembodied source of objectivity as opposed to a culturally produced text.

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[76] Part of the reason why this comprises a smaller role in the dissertation is because no one quite knows yet what the eventual impact of *Powley* is on Métis political movements specifically or subsequent government policy. This issue is discussed more fully in chapter seven.

Having said this, I will now lay the research agenda out, but with one caveat. There is something dishonest (or more generously, artificial) about writing a dissertation's methodology chapter. Most of us write our methodology chapters last, or at least completely revamp our original draft, and we mostly give a lie to the idea that the researcher went into the research area with eyes already wide open and with pre-existing research frameworks which were used to form the analytical basis. More sophisticated and honest arguments stipulate that as the researcher moved back and forth between inductive and deductive reasoning, in addition to the questions they asked, the material 'asked questions' back to them. In turn, this immersion helped formulate further questions, resulting in a game of intellectual ping-pong between researcher and text(s).

Thus, I think it is true that however much we don't like to admit it, there is an important aesthetic component to our research. That is to say, the legal discourses I focused on were not the only ones I could have analyzed. Ultimately, my choices were to a certain extent based on the fact that I found them the most interesting and they resonated most personally with my own background and things I had been thinking about regarding my family's history. Looking back on the analysis, I was thus in the initially uncomfortable position of not being able to provide a fully intellectual justification for my work, but rather an aesthetic one (i.e. 'because I found these ones most interesting'). However, the more I thought about this, the more I would argue that anyone who tries to base their analysis fully on 'intellectual' grounds rather than because they find the work interesting is either deluded or a positivist, assuming an objective, disinterested stance.

The Court Case Files

I pointed out in chapter two that it is not a good idea to treat Canadian 'law' as a unitary entity. Often, and especially in the context of Aboriginal rights, the most fruitful lines of analysis lay in the tension between the courts and the direct policy makers – both of which are collapsed into 'law' in most conventional formulations but which in practice are miles apart with respect to the logics and procedures used to produce their respective texts (whether court decisions or enabling and/or subordinate legislation). Moreover, exactly what the courts are, and what they protect vis-à-vis the abstract notion of 'rights', is historically variable. Thus, when I say that this research is examining the courts[77], I mean it focuses on various texts comprising the court files of the Métis harvesting rights case *R. v. Powley*, totaling some twenty-eight hundred pages of material, including the Court of Appeal for Ontario and the Supreme Court of Canada levels. Treating the courts as a social field enables us to understand them as hierarchical arenas of struggle within which differentially positioned actors compete over the preferred and eventual substance of the court decision.

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[77] The Canadian court apparatus is comprised of a combination of federal and provincial 'systems', and is fundamentally hierarchical in nature (Castel and Latchman, 1996). McCormick (1994) suggests that we can avoid the excessively technical jargon often used to describe the court process by keeping in mind a few basic principles of Canada's court system. These are: that less serious cases are routed towards higher volume/quicker outcome courts; that less frequent, more serious cases are routed to 'lower-volume' courts which give them more sustained attention; that Court of Appeals are used to correct errors in lower court decisions while ensuring parity among the court cases in the jurisdiction; and finally, that a more general and ultimately binding Court of Appeal serves to promote a more general uniformity across the country (McCormick, 1994: 23). More technically, decisions delivered from a higher level of court always supersede those of a lower court, and appeals are always made from the lower to higher level, with the Supreme Court of Canada having the ultimate and final decision-making power (Castell and Latchman, 1996: 7). In the context of the present research, the Powleys went before (in order): the Ontario Court of Justice; the Ontario Superior Court (the court of first appeal for Ontario); the Court of Appeal for Ontario (the final court of appeal for Ontario) and the Supreme Court of Canada (the court of last appeal for Canada).

The grammar of this struggle takes place primarily through the Ontario Crown, the Powleys' lawyers and the assorted intervener factums submitted before the Court of Appeal for Ontario and the Supreme Court of Canada, but also the oral arguments of lawyers and the direct testimony of lay and expert witnesses in the original trial decision. Although interveners submitting factums were required to submit to the rules before these two levels of court regarding their applicability in the present case (discussed below), there is no indication that anyone applying for intervener status was denied. I will now explain the court case files in more detail, providing a summary of positions first for the Court of Appeal for Ontario and then for the Supreme Court of Canada. Additionally, I begin each section with a brief explanation of rules for intervention.

Interveners – Court of Appeal for Ontario

Rules of Intervention

Few rules exist for intervening at the Court of Appeal for Ontario. The *Ontario Rules of Civil Procedure* (Rule 13.01 (1)) state that interventions are permissible if the interested party can demonstrate:

a) an interest in the subject matter of the proceeding;
b) that the person may be adversely affected by a judgment in the proceeding; or

c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding[78].

The Court of Appeal justices then make a determination about whether "intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding" (Rule 13.01 (2)). Similarly, an interested party can make application to the court as a 'friend of the court', and can even be invited by a presiding judge to take part in the case (Rule 13.03). In short, an interested party need only demonstrate that the decision will impact them in some way. In submitting their factums, they must take care to follow the explicit and painstaking regulations (right down to the colour of the cover sheet) set out in Rule 4 of the *Ontario Rules for Civil Procedure.*

Four organizations were granted leave to intervene in the *Powley* case at the Court of Appeal for Ontario. At this level of court, each of the interveners represented an Aboriginal interest. Thus, the objective positioning of the juridical field in this matter and at this level was relatively simple, consisting of a binary opposition between the Ontario provincial Crown and all other legal actors (although the reasoning for their positions demonstrated a degree of internal variation). Thus, the legal actors siding with the Powleys include all the Aboriginal organizations which argued that the Powleys were Métis and that the existing Ontario provincial hunting regime violated the Powleys' section 35 constitutional rights to hunt. Conversely, the Ontario provincial Crown represented the lone legal actor arguing against the Powleys as rights-bearing Métis and as such ineligible for protections arising from section 35. Their argument was based on one reading of the *Van der Peet* decision, from which they suggest that the Powleys failed to prove a sufficient connection between themselves and their ancestral Métis communities. The following organizations each intervened for rather than against the Powleys:

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[78] http://www.travel-net.com/~billr/law/parties.html#RULE%2013

∞ **Aboriginal Legal Services of Toronto**: the Aboriginal Legal Services of Toronto is a non-profit 'status blind' legal organization which advocates on behalf of the large Aboriginal population of Toronto. In endorsing the Powleys' factum, this intervener argued that Métis are included in section 35 as a distinct and autonomous Aboriginal people and not because of their First Nations ancestry. Thus, they asked for a modification of the *Van der Peet* test to allow for the protection of distinctive Métis cultures.

∞ **Ontario Métis Aboriginal Association:** The Ontario Métis Aboriginal Association (OMAA), in existence since 1971, represents non-status Aboriginal people living in the province of Ontario. Interestingly, the Powleys used to be part of this association prior to joining the Métis Nation of Ontario. OMAA agrees with the facts as set out by the Powleys' legal counsel but argue that at least part of the purpose of section 35 should be to ameliorate the layers of discrimination suffered by past Métis communities and allow for the self-determination of Aboriginal communities to define their own membership.

∞ **Congress of Aboriginal Peoples:** formerly the Native Council of Canada (the organization responsible for overseeing the inclusion of the specific term 'Métis' into section 35 of the 1982 *Constitution Act*), the Congress of Aboriginal Peoples (CAP) purports to represent approximately 750,000 Métis and off-reserve Indian peoples and intervenes because its current attempts to negotiate various harvesting, land and self-government rights with the Canadian government had thus far fallen on deaf ears. The

Congress of Aboriginal Peoples suggests the purpose of section 35 is to allow Aboriginal collectivities to persist and to require that legislative enactments which endanger this persistence be required to pass a justification test. Similarly, they suggest that 1867 is the appropriate date, since Ontario became a province in 1867 and it is only after that point that settler presence and shared governmental institutions would have provided the Ontario Crown with effective governmental control.

∞ **Métis National Council**: The Métis National Council (MNC) is the 'national voice' for the Métis Nation in Canada and is comprised of five regional organizations including the Métis Nation of Ontario, the Manitoba Métis Federation, the Métis Nation-Saskatchewan, the Métis Nation of Alberta, and the Métis Provincial Council of British Columbia. In upholding the Powleys' legal counsel arguments, MNC argues that the term 'Métis' was a term historically used by members of the Métis Nation to describe themselves (unlike, for example, the term 'Indian'). Moreover, they suggest that Métis are a fully and distinctively Aboriginal political collective and as such their mixed ancestral heritage is irrelevant to the judicial determinations of section 35 rights. As such, any rights which accrue to section 35 must accrue to a Métis *people*. Likewise, regardless of the outcome of the case the Métis National Council argues that the Court of Appeal for Ontario must resist from making broad pronunciations about membership in the Métis Nation – only the Métis Nation can make these decisions.

∞ **The Powleys' legal team (the Respondents):** The Powleys' legal counsel argue that the purpose of including Métis in section 35 was to 'deal fairly and justly' with the Métis and to reflect their distinctive history as an Aboriginal people. In this sense, that the Métis were included in section 35 reflects their position as a 'fully' Aboriginal people.

As such, the *Van der Peet* test needs to be modified to allow the courts to account for their distinctiveness while still guaranteeing real protection under section 35. This, they argue, can be accomplished through a modification of the pre-contact requirement to pre-effective sovereignty.

∞ **The Ontario Provincial Crown (The Appellant):** The Ontario provincial Crown argues that Métis were included in section 35 to protect their Aboriginality. However, since Métis are part European, section 35 can only protect those aspects of Métis culture that is Aboriginal in nature. Thus, pre-contact is the appropriate time frame for gauging Métis Aboriginality, since it is consistent with the original *Van der Peet* test (see chapter three) and because it provides a clear-cut distinction between what is 'Aboriginal' and what is not. In this sense, Métis are only 'part' Aboriginal and thus any rights they hold must be seen as derivative of their pre-contact ancestors.

Interveners – Supreme Court of Canada

Rules of Intervention

Like at the Appeal Court for Ontario, relatively little jurisprudence exists on who qualifies as an intervener. The Supreme Court of Canada has itself said very little and the eligibility issue appears to fall largely within its discretion, based on a general set of rules for interveners. These basically stipulate that in order to be granted intervener status the interested party must demonstrate a fairly direct interest in the case and hold "reasons for believing that the submissions will be useful to the Court and different from those of the other parties" (Supreme Court of Canada website, 2003: Rule 18 (3) a. and c. – also see *Reference re Workers' Compensation Act 1983 (Nfld.)*, 1989, para. 6). Intervener status allows the party to file a factum (not to exceed 20 pages) but requires formal permission from the court to present an oral argument. The exact parameters of the intervention are set out at the same time the Supreme Court of Canada decides whether to allow the appeal (see *R. v. Powley*, 2001b). As a general rule, the Attorney General of Canada, as well as the Attorney Generals and the Ministers of Justice for the provinces are exempt from these requirements (particularly with respect to the page length of their factums and their permission to give oral arguments) (Supreme Court of Canada website, 2003: Rule 18 (8)).

Each intervener who was granted leave to intervene[79] in the *Powley* case at the Supreme Court of Canada stated their direct interest in the matter, taking a position on one (or several) of a variety of issues which arose from the case's constitutional question. This question, although worded in technical jargon, focused on whether the *Game and Fish Act* of Ontario violates the section 35 Aboriginal rights of Steve and Roddy Powley. As the dissertation explores, however, even a seemingly narrow, relatively technical question of law contains within it a whole constellation of discourses which revolve around deeply seated notions of race, place and Aboriginality. The actual question is as follows:

> Are ss.46 and 47(1) of the *Game and Fish Act,* R.S.O. 1990, c.G.1, as they read on October 22, 1993, of no force and effect with respect to the Respondents, being Métis, in the circumstances of this case, by reason of their aboriginal rights under s.35 of the *Constitution Act, 1982*? (*R. v. Powley*, 2001b: 6 – emphasis added)

The intervener factums, which are "bound by the case on appeal and may not add to it" (SCC website, 2003: Rule 18 (5)b), each agree with the facts of the case as set out by the

Powleys' legal counsel and Ontario provincial Crown and instead focus their discussions on whether the Powleys are Métis and whether their Aboriginal rights include the right to hunt in the indicated geographical space.

Broadly, the interveners can be divided into three basic groups, although there is as much variation within the groups as between them. These include: 1) government interveners (which include the Attorneys-General for all provinces and the Attorney-General of Canada); 2) private, non-Native interveners (whose interventions, although answering the constitutional question along the lines of the Attorneys-General, are generally focused on the specific issue of resource conservation concerns); and 3) Aboriginal interveners who, although all answering the constitutional question affirmatively, rationalize such answers on a broad array of grounds, several of which will lead to future internal conflicts. Importantly, although the factums require an affirmative or negative answer and as such, serve as a superficial method of separating the interveners analytically, the actual logic underlying the meaning of various legal issues are separate and in fact, sometimes conflicting[80]. Having made this point, the following organizations comprise the Supreme Court of Canada interveners for the *Powley* case.

Government Interveners

∞ *Attorney General of Alberta* – The Alberta Attorney-General's intervention takes a 'scattergun' approach to the case, casting a wide net over a number of issues which may

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[79] Some interveners were granted leave to provide oral argument before the Supreme Court of Canada (which took place in March of 2003); others were granted only a written intervention.

become central to the case. In particular, however, Alberta urges the courts to avoid a broad pronouncement on the nature and scope of Métis rights, such that any conclusions should not apply to Alberta because of its unique relationship with the Métis living within that province.

∞ *Attorney General of British Columbia* – the Attorney General of B.C. is intervening on the issue of deciding the 'correct' test for determining the Métis' Aboriginal rights. Their argument is that s. 35 rights were intended to protect Aboriginal rights but not to create a new or separate category of 'Métis rights'. Thus, B.C. argues that the *Van der Peet* test is the appropriate test for determining Métis rights. Moreover, even if the *Van der Peet* test were to be relaxed, the A.G.-B.C. fears that creating a separate category of rights would be unfair to First Nations people. Thus, they submit that s. 35 Métis rights should be based in the same source as those of First Nations – pre-contact existence.

∞ *Attorney General of Canada* – the Attorney General of Canada follows closely the logic set out in the Ontario provincial Crown's factum, with the notable exception that they dismiss the Appellant's construction of Métis Aboriginal rights as 'derivative'.

∞ *Attorney General of Manitoba* – Manitoba's Attorney-General offers a similar intervention, arguing that existing Aboriginal rights jurisprudence as set out in *R. v. Van der Peet*. Their interpretation in this context is that Métis Aboriginal rights descend from the practices integral to their First Nations ancestors prior to contact.

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[80] For example, one line of tension which flies in the face of monolithic constructions of 'the state' are the attempts by provincial Attorney Generals to foist responsibility of Métis litigants onto the federal government (and vice versa).

∞ *Attorney General of New Brunswick* – the Attorney General is intervening on the question of the limits of the historical Métis territory, arguing that Sault Ste. Marie, ON (the area where the hunting took place) is not part of traditional Métis territory. New Brunswick has numerous mixed ancestry communities which could, if a liberal interpretation of Métis was enacted, use s. 35 to pursue various kinds of rights.

∞ *Attorney General of Newfoundland & Labrador* – This Attorney-General's intervention focuses on the issue of which Métis can benefit from section 35 rights. They argue that mere mixed ancestry is not enough. Rather, s. 35 rights must be based in Métis communities which are both distinct and which pre-figure the European assertion of sovereignty (Newfoundland & Labrador, 2003: 7). Thus, "[p]olitical organizations may be beneficial in advancing the political agenda of members but membership in such organizations, per se, cannot meet the requirements of section 35" (2003: 7). This represents a fairly bald attempt to reduce any potential rights of the newly formed Labrador Métis Nation.

∞ *Attorney General of Saskatchewan* – Mitch McAdam, counsel for Saskatchewan, has a strong background in Métis resource rights issues, in part because the Métis Nation-Saskatchewan has been at the forefront of litigating these issues[81]. Many of these cases have fallen to McAdam to litigate. Saskatchewan intervened in the *Powley* case because its outcome raises significant issues with respect to the large Métis population living within Saskatchewan's provincial borders.

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[81] In fact, prior to the Powley decision, Saskatchewan had been the scene of the earliest litigation on section 35 Aboriginal harvesting rights case, including *R. v. Morin & Daigneault* (1998, 1996), which dealt with Métis harvesting rights in northwestern Saskatchewan.

Non-Government, Non-Aboriginal Interveners

∞ *B.C. Fisheries Survival Coalition* – this privately funded organization, comprised of 'concerned commercial fishermen', is generally opposed to any kind of distinctive rights for Aboriginal resource harvesting. Although operating primarily out of British Columbia, they intervened in *R. v. Powley* on the issue of harvesting and conservation and particularly the extent to which any 'special rights' for Aboriginal people infringe upon those of non-Native fishers. As stated in their factum, "[t]his Intervener is interested in a clear jurisprudence, particularly about limits on aboriginal rights and their interface with the public right of fishing" (Survival Coalition Factum, 2003: 1).

∞ *Ontario Federation of Anglers and Hunters* – according to their Factum, OFAH is "the largest conservation organization in Ontario, and the largest association of its kind in Canada. Its members consist of hunters, anglers and other outdoor enthusiasts who sponsor fish and wildlife research, rehabilitate fish and wildlife habitat, run education programs, advise governments about resource use, and coordinate programs with other conservation organizations" (OFAH, 2003: 1). They are intervening specifically on the issue of how conservation should properly be 'measured' and specifically, defining 'distinct' Aboriginal practices as those which existed prior to contact.

Aboriginal Interveners

∞ *Aboriginal Legal Services of Toronto* – the ALST is a "non-profit, multi-service legal agency" (ALST, 2003: 1) which has its roots in the Native Canadian Centre of Toronto. ALST represents and advocates on behalf of the enormous Aboriginal community in Toronto (ALST website, January, 2003). It is not clear why they were given leave to intervene in the *Powley* case, other than the possibility that the courts might take a broad view of their responsibilities and create a broad test of who qualifies as 'Métis' – since their organization deals with Aboriginal people the case might have had important implications. In any event, their intervention focuses on the issue of re-tooling the *Van der Peet* test to take into account the distinctive historical circumstances surrounding the formation of Métis collectives.

∞ *Congress of Aboriginal Peoples* – CAP, the forerunner of which was the Native Council of Canada, was formed to represent the rights and interests of all off-reserve Aboriginal people in Canada, whether First Nations, Inuit or Métis. They purport to hold a constituency numbering in the hundreds of thousands. Their major claim to fame was their (predecessors') pivotal role in ensuring that 'Métis' received explicit inclusion in section 35 of the 1982 *Constitution Act* (see Daniels, 2002). Their intervention critiques the *Van der Peet* pre-contact test, arguing instead for a more principled test which accounts for the unique circumstances underlying the formation of distinctive Métis communities.

∞ *Labrador Métis Nation* – this group purports to represent thousands of mixed ancestry Inuit living in Labrador, self-described Métis. These individuals never necessarily self-identified as 'Métis' in the past and in fact, make no pretences (at least in their factum) to representing a self-conscious, separate community of people with their own distinctive history. Their intervention focuses on the degree to which the Supreme Court of Canada should recognize the diversity of communities falling within the descriptor 'Métis'.

∞ *Métis Chief Roy E.J. Delaronde* – Delaronde represents himself as the 'Métis Chief' of the 'Red Sky Métis Independent Nation' (RSMIN), an organization with its roots in the Great Lakes region of Ontario. RSMIN purports a membership of more than 6,000 Métis living in 66 communities scattered throughout Northwestern Ontario. Delaronde is intervening on the issue of whether the Métis of that region have treaty rights emanating from the 1850 Robinson-Superior Treaty.

∞ *Métis Nation of Ontario* – the Métis Nation of Ontario is a political organization which advocates on behalf of Métis people living within Ontario (and in fact is personally involved with the case itself through their political support of the Powleys). MNO is a constituent of the Métis National Council and wrote a joint factum with the MNC, providing a baseline definition of who the Métis Nation is, as well as presenting evidence about their historical territory, population and kinship movements, self-identifying membership, common communal indicia, external recognition and collective consciousness.

∞ *Métis National Council* – The MNC was formed in 1983 to advocate on behalf of descendent communities of Métis who link themselves to the historical 'homeland' which covers most of western Canada east of the Rockies, extending north into the Northwest Territories, east into northern Ontario (in the Great Lakes region) and south into the northern United States (including Montana and North Dakota). The MNC Factum (written jointly with the Métis Nation of Ontario) urges the Supreme Court of Canada to stay within the factual confines of the case and to resist making broad determinations about the relationship between Métis peoples and section 35 of the 1982 *Constitution Act* (Métis National Council Factum, 2003: 5).

∞ *North Slave Métis Alliance* – the NSMA is an organization which represents the descendents of Métis who used and occupied the North Slave Lake region prior to the signing of Treaty 11 in 1921. Registered in 1996, the organization's goals involve negotiating a land and resource agreement with Canada, as well as promoting the health and well being of Métis in the region. Their intervention focuses on a critique of the *Van der Peet* test, arguing that recognition of Métis rights must "treat [them] as distinctive Aboriginal peoples with their own history, laws, spiritual values and culture" (North Slave, 2003: 1).

∞ *Ontario Métis Aboriginal Association* – OMAA is a political organization representing Métis and off-reserve First Nations people in the province of Ontario. Although in existence for more than thirty years, OMAA is largely at odds with the Métis Nation of Ontario and in fact, Steve Powley was originally a member of OMAA rather than MNO, who provided the specific political and financial support to Steve and Roddy Powley. The OMAA's intervention urges the Supreme Court of Canada to take a purposive approach to section 35, which would include recognizing the Métis' right to self-determination (in the context of defining community membership), taking into account the unique circumstances of the Métis vis-à-vis the *Van der Peet* test and avoiding a definition of Métis that requires proof of ancestry.

Justification for Studying the Powley decision(s)

Canada is a constitutional democracy (Dickson, 1984). This fact constitutes the centerpiece of the previous chapter's theoretical argument that Canada's courts, given their position as interpretive guardians of Canada's Constitution, 'govern at a distance'. That is to say, although they lack the crucial practical aspect that direct governance entails (see O'Malley, 1993), courts generate discourses which get translated into 'concrete' policy discourse (see Simon, 1993), sometimes through enabling legislation but more usually through orders-in-council or informal, ad-hoc policy. Thus, they often set the parameters within which conversations about policies take place (Manfredi, 2001). Particularly since the inception of the *Charter of Rights and Freedoms* in the early 1980s, the Supreme Court of Canada has taken on a more visible – and active – policy orientation. This means that for good or ill (see Bakan, 1997; Mandel, 1994; Manfredi, 2001) courts are increasingly being looked to as the final arbiter of social justice (see Martel, 1999).

As well, although theoretically Canadian citizens possess the ability to contravene court decisions by lobbying legislative representatives into enacting legislation (which might limit the effects of particular court decisions), any subsequent legislation must follow the *Charter of Rights and Freedoms*, itself subject to the interpretation of courts[82]. In this way, and without actually implementing policy, courts exert a powerful though indirect presence on its shape and content. Thus, examining the courts as opposed to the legislature makes sense because strategically, courts hold a more powerful position in Canada's political field, a position strengthened with the patriation of the 1982 *Constitution Act*. Moreover and more specifically, in recent years "[t]he courts have often been more sympathetic to aboriginal hopes than the political [sic] forum. In turn, court decisions have prompted a number of policy breakthroughs in the political arena in the past twenty years" (Macklem & Townshend, 1992: 79). With respect to Aboriginal rights, then, courts are 'where the action is'.

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[82] Bear in mind that technically, section 33 of the *Constitution Act, 1982* gives the federal and provincial governments the opportunity to shield a particular piece of legislation from provisions of the Charter of Rights and Freedoms. This 'notwithstanding' clause has, according to Manfredi (2001: 4-5) atrophied to the point where the Supreme Court of Canada feels little fear of legislative bodies undermining its authority as the final arbiter of authority in Canada. Moreover, in the days leading up to the 2004 Canadian Federal

Ultimately, analyzing both common law and statute law would be most beneficial because it would assist in understanding the broader reverberations of the *Powley* decision in the legislative arena and the ways in which the judicial discourses generated by the *Powley* decision are interpreted by legislative enactment. In this case, however, there is very little contemporary specific legislature dealing explicitly with Métis issues. 'South of 60' (the 60th parallel dividing the Northwest Territories and the provinces), only Saskatchewan and Alberta have enacted enabling legislation specific to the Métis, and federal legislation is non-existent. Conversely, although there are relatively few appellant court decisions pertaining to the Métis, the *Powley* case (along with the jointly heard *Blais* case) was heard before the Supreme Court of Canada on March 17th, 2003 and delivered on September 17th, 2003. This case represents the most mature thinking on jurisprudential matters pertaining to the Métis.

In addition to these reasons, there is an additional reason why studying the formation of Métis definitions through a court case is relevant. The Métis – especially, but not only, their political leaders – possess what Alan Cairns refers to as 'constitutional identities'. That is to say, groups like the Métis

> …see their fate as affected by the evolving meaning attached to particular constitutional clauses. They monitor the development of judicial interpretation of their clauses. They fear that constitutional reform processes that exclude them will rearrange the constitutional order in a manner detrimental to their interests. In sum, their particular constitutional concerns generate a higher profile for the constitution in their lives than is the case for the general citizen body (Cairns, 1995: 120).

The problem with making a claim like this is that it is fairly difficult to prove outside of actually interviewing people directly. At the time I began my research on this court case it was still making its way through the courts and as such, I felt I would have a difficult

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Election, one Canadian Alliance Party member's comments about a willingness to invoke time interviewing legal actors and associated political leaders and getting them to open up and be frank about the case. Therefore, I decided to focus simply on the court case files themselves. However, outside of directly interviewing relevant information, evidence exists that the notion of a 'constitutional identity' holds some validity, for several reasons.

First, in the last decade Métis political organizations have made a more concerted effort to use the courts to pursue traditional harvesting and resource rights. This focus is certainly reflected in their websites (which are, I would suggest, a major way that Métis political organizations represent themselves). The Métis Nation of Ontario, the Manitoba Métis Federation and the Métis Nation–Saskatchewan in fact dedicate space to the specific issue of 'Métis rights' on their websites. For example, the Métis Nation–Saskatchewan states that "[a]fter the failure of the Charlottetown Accord, along with the companion Métis Nation Accord in the fall of 1992, the leadership of the Métis in Saskatchewan responding to the advice of Métis Elders, decided to begin defending the rights of Métis people in the courts"[83]. Similarly, the website of the Métis Nation of Ontario (the organization of which the Powleys are members) has a dedicated space for keeping visitors abreast of developments in the *Powley* case, including various updates on Métis rights case law as well as numerous media articles and clips pertaining to Métis rights in general[84]. The Manitoba Métis Federation has not only launched a case against the Canadian government regarding the historical issues arising from the maladministration of the *Manitoba Act*, 1870, they have begun work on a comprehensive

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the notwithstanding clause is thought to have contributed to their loss in the election.

[83] http://www.metisnation-sask.com/rights/index.html - January, 2004.

[84] http:// www.metisnation.org – January, 2004

Métis rights strategy (which include 'negotiations and litigation') for dealing with "[c]urrent federal and provincial positions, policies and laws [that] deny that Métis land, title, harvesting and resource rights exist within the Métis Homeland[85]".

Secondly, aside from local histories of Métis communities which tend to place a heavier emphasis on their fur trade roots, the larger history of the Métis Nation (of which the provincial organizations are a part) emphasize illegal (or at least, unjust) dealings of the Canadian government in their past relationships with the Métis. In other words, past and present legal and constitutional relationships with provincial or (more usually) federal government are highlighted. The Métis National Council in particular upbraids the Canadian federal government for their shoddy dealings which (they argue) led to the Riel Rebellion in 1885 and the subsequent hanging of their leader, Louis Riel. In fact, the post-1885 history of the Métis focuses on the federal government's continual denial of their rights, and their resistance and attempts to maintain their collectiveness in light of government inaction. On the one hand, this is a political history and as such one might expect it to focus on political events. On the other hand, however, this is precisely the point I am trying to make – the Métis National Council is explicitly privileging the political history.

'Reading *Powley*': a discourse analysis

A dominant theme in case study research centres on the appropriate procedures for evaluating the evidence in the chosen case. In other words, how does the researcher go about looking for answers to particular research questions? What constitutes evidence? Often, collecting case study evidence for sociological analysis is achieved through *content analysis.* Content analysis is essentially utilized to 'count' the frequency of occurrence of some aspects of the documents being studied. It holds up standards of objectivity, systemativity and generality – other researchers should be able to collect and analyze similar data, it has to be systematic, reporting what does or does not support working questions, and it must be generalizable to larger theoretical questions (Baker, 1998: 269-70). Moreover, a quality content analysis is said to be *manifest*: "in other words, stressing that what was said or written or shown was what should be studied" (Baker, 1998: 270).

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[85] http://www.mmf.mb.ca/2initiatives.htm - January, 2004.

The shortcoming of content analysis is that valuable interpretations may be drawn as much from what is *not* part of the document as what is there. This dissertation is written with the supposition that what is not manifestly written – what is *assumed* – constitutes an equally important portal of investigation. This analytical tack – at least, its Foucauldian variation – falls under the concept of *discourse analysis.* Discourse analysis begins with the assumption that discourses are not "passive reflections of an assumed 'reality' but rather, ostensive decrees enunciated from within social contexts and expressing underlying relations of force" (Pavlich, 1996: 9). A discourse analysis focuses on and assists in uncovering these deeper relations of force, their rules or grammars of enunciation that shape and fix the range of 'legitimate' discourse.

Earlier, I discussed the concept of discourse and how discourses of race intersected with legal issues around the alienation of the Métis Aboriginal title. The point of discourse analysis is to demonstrate the degree to which the very power of concepts lies in the force with which they are enunciated, rather than in their acontextual or asocial validity. To borrow from Stuart Hall, what counts as 'true' is never innocent and as such truths, and their positions in what Hall (1996) calls "the hard game of power", need to be investigated. Discourse analysts seek to understand the limits and effects of that power and to demonstrate the larger regimes within which particular discourses circulate and are accorded legitimacy. For example, why is the idea of racial intermixing accorded such an important position in the perception of Métis identity formation? In this day in age, Métis are no more 'mixed' than First Nations. Yet, while 'mixedness' sits at the periphery of the latter, it figures centrally in those of Métis identities.

Thus, an important part of discourse analysis seeks to uncover and delegitimize the naturalness or self-evident nature of words and concepts, to show how they function as a result of their place in a larger system of representation (what Foucault refers to as a discursive formation). This also requires investigating not only the strategic emphasis and prominence of certain concepts but also the gaps and silences which accompany their use. In this context, I focus on two contexts of the use of 'Métis': 1) the larger discursive environment within which Métis are situated, in this case the long and tattered history of race and hybridity in Canada and; 2) the system of differentiation against which Métis is polarized. In this case, discourses around mixedness collide with constructions of legitimate indigeneity and community belonging, both in the context of the appropriate time frame for determining Aboriginality (and where to place the Métis in this regime of representation) but also the appropriate frame for constructing notions of community belonging.

The next two chapters consist of my analysis of the discourses submitted by the legal actors in *R.* v. *Powley* at both the Court of Appeal for Ontario and the Supreme

Court of Canada[86]. In chapter five (the Court of Appeal for Ontario) I analyze three specific themes: 1) the legal actors' discussion of the purpose of including Métis in section 35 of the 1982 *Constitution Act*; 2) a discussion of what makes Métis Aboriginal; 3) Following from this analysis, the third theme analyzed focuses on the discourses around determining an appropriate date for assessing the authenticity of Métis indigeneity.

In chapter six, I reproduce these analyses using the considerably expanded number of legal actors (and their associated discourses). If chapter five is weighted in favour of discourses favourable to the Powleys (given that all the interveners represented Aboriginal interests), chapter six included eleven interveners on behalf of Canada's different governments (the ten provinces as well as the federal government) which generated an array of legal discourses quite unfavourable to the Powleys. Four major themes are analyzed: (1) the purpose of including Métis in section 35 of the 1982 *Constitution Act;* (2) from this, an expanded analysis of what legal actors thought made Métis Aboriginal; (3) an analysis of the various dates offered for gauging the authenticity of Métis Aboriginality; (4) the relationship between blood quantum and membership in a section 35 rights-bearing community.

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[86] Originally, I had planned to analyze only the most recent level of court case, which at the time I began this analysis in earnest was the Court of Appeal for Ontario. However, the Supreme Court of Canada decision was rendered more quickly than I had anticipated and perhaps more importantly it differed significantly from the Court of Appeal for Ontario decision. Thus, I made the decision to analyze each of the last two levels of court, including the addition of fourteen new interveners at the Supreme Court of Canada level.

CHAPTER FIVE

MÉTIS AS HALF-AN-INDIAN: MÉTIS AND SECTION 35 AT THE COURT OF APPEAL FOR ONTARIO

INTRODUCTION

This chapter focuses empirically on two major themes of the dissertation in the specific context of juridical constructions of Métis Aboriginality. Recall my argument in chapter two that an important feature of the juridical field is that neither judges nor any other single actor in the field hold complete sway over the eventual court decisions. Rather, these decisions represent the outcome of a hierarchically organized field of struggle within which actors compete to impose their version of justice onto the other actors of the field. Likewise, recall in chapter one that racial and cultural difference served as a key hub for how courts position authentic Aboriginality, particularly the differences between pre- and post-contact (and pre- and post-colonized) indigenous community lifestyles.

The courts are a special case of a social field because the procedures through which conflict is mediated are far more precisely delineated than in other social fields (Bourdieu, 1987). The highly formalized procedures of the judicial field order conflicts into precise legal questions. This controls both the form of the question and the range of issues considered relevant in answering it. Likewise, it circumscribes the range of sociological imagery employed by legal actors, since only imagery which assists in answering specific legal questions is used. In the context of the Court of Appeal for Ontario, the issues on appeal stem from the Powleys' constitutional defense to an infraction against s.46 and s.47(1) of Ontario's *Game and Fish Act, 1990*[87]. The Powleys' defense amounted to an argument that these sections of the *Game and Fish Act*, as well as Ontario's *Interim Enforcement Policy* (IEP) put in place after the 1990 Supreme Court of Canada *Sparrow* decision, contravened their section 35 Aboriginal rights to harvest the land for subsistence purposes.

> ...the Powleys' primary position was that (1) they were Métis within s. 35 of the Constitution Act (2) they have an existing Aboriginal right to hunt or in the alternative, a treaty right to hunt and (3) the Game and Fish Act is not applicable to them because it violates s. 52 of the Constitution Act (Ontario Court of Justice, 1999: para. 11).

Although this may seem a relatively straightforward statement, its answers represent an incredibly complex archipelago of legal principle, case law and evidence: judges must make pronouncements on the meaning of 'Métis within s. 35', 'existing', 'Aboriginal', 'right to hunt' and even 'they'. Each of the words in the Ontario Court of Justice quote relies upon fairly settled understandings of indigeneity in relation to the pre- and post-contact divide and as such gives rise to distinctly different sociological imagery.

Since the issues are so precisely formulated, the position takings, although clustering along multiple legal axes, tend to cluster along fewer sociological ones. This is due to the largely adversarial process which characterizes the Canadian courts; precisely formulated questions requiring a 'yes or no' answer tend to create black and white position takings by legal actors. In the present research, these positions are largely contingent on whether the players answered the legal question affirmatively or negatively; in answering the Ontario Court of Justice's original question, the various legal actors employed sociological imagery to anchor their version of 'law'. Three themes were centrally debated in the Court of Appeal for Ontario court files:

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[87] For a discussion of how Aboriginal hunting became illegal in Ontario, see Tough (1994).

i) the purpose of including Métis in section 35 of the *Constitution Act, 1982*;
ii) the features which make Métis culture distinctively Aboriginal;
iii) the appropriate date for marking Métis indigeneity.

Three constructions of Aboriginality underlay the different positions taken in the *Powley* case – what I will term moribund, passive and aggressive. Moribund constructions of Aboriginality are tacitly premised on the idea that indigenous culture – *real* indigenous culture – is frail, unable to bear the weight of European cultural influences. That is to say, the slightest contact is enough to destroy it. This understanding is rooted in enduring stereotypes about the supposedly unspoiled or unsullied character of pre-contact indigenous cultural practices, which are allowed no change in time or space. Conversely, passive constructions of Aboriginality allow for its limited evolution. This second model turns on the notion that indigenous cultures, like all cultures, change over time and yet may nevertheless remain distinctively Aboriginal. The latter cannot change *too* much, however. It must stay within the bounds of the court's legal imagination while seeking to test those boundaries and in doing so, changing the very terrain of the judicial field itself. The third construction of Aboriginality, aggressive, is positioned as something equally powerful to that of incoming settler society such that not only can it preserve its own cultural symbols and practices, it can change those of settler society.

In addition to the three sitting judges, the appeal court level of the *Powley* decision involved seven major legal actors: the Respondents (the Powleys), the Appellant (the Ontario provincial Crown), the Court of Appeal for Ontario, the Congress of

Aboriginal Peoples, the Métis National Council, the Aboriginal Legal Services of Toronto and the Ontario Métis Aboriginal Association. However, the legal questions underlying the consideration of section 35 Aboriginal rights are immense and interveners often intervened only on specific parts of larger legal questions. Thus, the rest of this chapter examines the three major themes (mentioned above) relating to Métis Aboriginality: the purpose for their inclusion in section 35, the features which make them Aboriginal and the appropriate date for determining this Aboriginality. These position-takings emerged as the dominant ones and comprise the general landscape of the court discourses comprising *R. v Powley*.

Theme #1 – The Purpose for Including Métis in section 35

> Position #1: Métis are 'part' Aboriginal and 'part' European. They were included in section 35 to protect those elements of their culture which made them Aboriginal (held by Ontario Crown).
>
> Position #2: Métis were included in section 35 to ensure their survival as a distinctive Aboriginal culture (held by the Powleys' legal team, the Ontario Métis Aboriginal Association and the Aboriginal Legal Services of Toronto).
>
> Position #3: The Métis are a people, a nation who historically asserted their collective consciousness at various points throughout the nineteenth century. The purpose of section 35 is to protect this peoplehood (held by Métis National Council).

Theme#2 – Determining Métis Aboriginality

> Position #1: Métis are diluted Indians (held by Ontario Crown)
>
> Position #2 – Métis are 'fully Aboriginal' (held the Powleys' legal team and all Aboriginal interveners)
>
> Position #3 – Métis are *an* Aboriginal people (held by the Métis National Council and the Congress of Aboriginal Peoples)

Theme #3 – Determining the Appropriate Date for Métis Aboriginality

> Position #1: effective control by colonial authorities constitutes the proper time frame for considering the indigeneity of Métis culture (held by Powleys' legal team, and the Aboriginal Legal Services of Toronto).
>
> Position #2: the date of effective sovereignty is the proper date, as long as it is 'very early in history after contact'. Métis communities may be post contact but Métis practices must still demonstrate pre-contact origins (held by Ontario Crown).
>
> Position #3: The indigeneity of Métis culture became irrevocably tainted when the Crown assumed practical governmental control over Métis peoples (held by the Congress of Aboriginal Peoples).

In deciding how to order the positions, although as many combinations as there are actors are available, I ordered them based on the extent to which they engaged with other factums. In the first theme, the Ontario Crown's is presented first, followed by the Powleys' legal team's and Aboriginal interveners. This ordering is preferred because the Powleys' legal counsel engaged with the Ontario Crown's factum far more often than the other way around – therefore, placing the Powleys' arguments second provides a nice juxtaposition to the positions taken in the first. Additionally, the Congress of Aboriginal Peoples and the Métis National Council's positions accord very closely with the Powleys' legal team's arguments, and are easily incorporated into the Powleys'. I left the decision for the Court of Appeal for Ontario until the end of the chapter, because it allows us to read the decision in light of the competing discourses within which the judges were situated.

Theme #1: The Purpose of including Métis in section 35

> *Position #1 – Métis were included in section 35 to protect those elements of their culture which made them Aboriginal*

The Ontario Crown's argument is that the purpose of section 35 Aboriginal rights is not to protect a distinctive Métis culture but rather, to protect the parts of its culture historically 'Indian' in character. This logic is based on a straightforward application of the *Van der Peet* test, which uses the date of contact for determining Aboriginality (see chapter three). Thus, although the "Métis have part European culture and ancestry…it is submitted that section 35 recognizes them as "aboriginal" because they descend from the local Indian peoples and inherited many Indian cultural traits" (Ontario Crown Factum, 2000: para. 76). Likewise, following through on *Van der Peet's* logic, the Crown argues that "the practices and customs of the Métis that developed post-contact as a result of interaction with Europeans are not the concern of s.35" (para. 77). That is to say, any post-contact practices the Métis eventually developed which do not accord with pre-contact 'Indian' practices do not warrant constitution protection. The Crown suggests in fact that the Aboriginal rights for Indians are bound by this same logic (conveniently failing to mention that most First Nations communities possess specific treaty rights or, at the very least, possess title-based claims which allow them to evade *Van der Peet's* logic). "As with Indian aboriginal rights, s.35 is the means by which Métis use of the land for aboriginal purposes is reconciled with Crown sovereignty over Canadian territory" (Ontario Crown Factum, 2000: para. 78 – underline in original).

> It is important to limit the Métis right to its aboriginal roots since Métis rights ought to be treated, as much as possible, the same as Indian aboriginal rights. This recognizes the fact that the Métis people arose in part from the Indians early in Canadian history and used the land for aboriginal purposes. Practices flowing from the European heritage of the Métis, or that originated and were carried on

for the first time by the Métis themselves only after interaction with the Europeans, should not be protected as Aboriginal rights (Ontario Crown Factum, 2000: para. 86).

Position #2: Métis were included in section 35 to ensure their survival as a distinctive Aboriginal culture

The Powleys' legal team suggests, somewhat contrary to the reasons listed by the majority in *Van der Peet* (1996: para. 47), that Métis were included in section 35 for exactly the same reasons as Indian and Inuit people were included, to "protect their survival as an Aboriginal people" while allowing a "just reconciliation with Crown sovereignty" (Powley Factum, 2000: para. 26). In making this argument, they expressly refute the Ontario Crown's logic that Métis were included because of their Indian ancestry. "Such a theory [would give]…no meaning to s.35(2) and if accepted would result in denying its clear statement that the Aboriginal peoples of Canada included the Métis peoples. It would also result in denying the recognition and affirmation of the existing Aboriginal rights of the Métis" (Powley Factum, 2000: para. 28; also see Aboriginal Legal Services of Toronto Factum, 2000: para. 6 and Métis National Council Factum, 2000: para. 15-16).

Ensuring the survival of Métis 'societies' is particularly important because, the Powleys' lawyers suggest, historically "the rights of the [Aboriginals[88]] were often honored in the breach" (*R. v. Sparrow*, 1990: 117 in Powley Factum, 2000: para. 31). In fact, the Ontario Métis Aboriginal Association suggests that historical injustices suffered by Métis communities had the effect of making them particularly vulnerable to various disadvantage and stereotyping.

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[88] The original term is actually 'Indian' – however, the Powleys' legal team is using the underlying sentiments in a more comprehensive fashion to refer to Métis.

> Métis communities are historically disadvantaged groups in Canada. Métis communities experience social, economic and political disadvantage, constitute discrete and insular minorities and lack political power. They experience significant stereotyping and marginalization and do not benefit from the federal funding and programs established for registered Indian bands and reserves. They have been at high risk of assimilation and [have] struggled to maintain their Aboriginal identities and communities (Ontario Métis Aboriginal Association Factum, 2000: para. 10).

Likewise, the Métis National Council intervener ties this historical disadvantage into a broader *national* disadvantage suffered by the Métis Nation, particularly in the years following the Northwest Rebellion of 1885 and the hanging of the Métis leader Louis Riel. In this era, "Métis individuals became the poor, being rejected from the now dominant European settler towns/cities and being denied access to their Indian relations, who were now under the full control of the federal government's *Indian Act* and Indian agent regimes" (Métis National Council Factum, 2000: para. 23 – emphasis in original). Similarly, the Métis National Council points out the persistence of this discrimination in contemporary Canadian society by highlighting an exchange between Olaf Bjornaa (a Métis living in the Sault Ste. Marie, Ontario region) and Jean Teillet (the Powleys' lead counsel) regarding the discrimination he suffered as a child while attempting to attend grade school:

> (Teillet) Q. And did you go to school there, Mr. Bjornaa?
>
> (Bjornaa) A. Yes, I started school there.
>
> Q. And how long did you go to school?
>
> A. Well, I didn't go very long. When I first started there was two schools within Batchewana Bay. There was...was for the Natives at the village and down the Bay was for the non-Natives. When me and my sister first started, we started down the Bay at the white school. We were told we were Natives, we couldn't....we didn't belong there. Then we went up to the other school and we were told we were non-Natives, we didn't belong there and my mother said this is the problem with being a Métis. You're almost a displaced person in your own homeland (Trial Transcripts, vol. 4: 205; reference to this passage is cited in Métis National Council Factum, 2000: para. 24).

These and other instances of discrimination are the context within which Métis in Ontario find themselves vis-à-vis their attempt to negotiate distinctive relationships with the Ontario government. With respect to resource harvesting, the current situation is that the Ontario provincial government holds "an extremely clear position on Métis rights… [they] deny they exist" (Ontario Métis Aboriginal Association Factum, 2000: para. 12). The Ontario Métis Aboriginal Association legal counsel points in particular to a trial testimony exchange between Tony Belcourt (president of the Métis Nation of Ontario) and Jean Teillet, in which Teillet asks Belcourt to read aloud his letter from the Honourable Chris Hodgson, (then) Ontario Minister of Natural Resources:

> (Teillet) Q. And, Mr. Belcourt, I have a copy of a letter here to Mr. and Mrs. O'Connor and it is from the Honourable Chris Hodgson. Is that a copy of a letter that one of the citizens of the Métis Nation of Ontario sent to you in that regard?
>
> (Belcourt) A. Yes.
>
> Q. And can you read the highlighted paragraph at the bottom of Page 1 for us?
>
> A. (reading) "At the present time, the Ontario Government does not recognize Métis people as having special access rights to natural resources" (Trial Transcripts, vol. 1: 138).

The Ontario Métis Aboriginal Association argues that the refusal of the Ontario Ministry of Natural Resources to negotiate with Ontario Métis, coupled with the fact that status Indians living in Ontario do not require a hunting licence (nor are they bound by provincial game seasons for moose hunting), is proof of the persistence of stereotyping and alienation of Métis communities by the Ontario provincial government. Likewise, the Congress of Aboriginal Peoples argues that the prohibitively expensive genealogical tests required by the Ontario Crown to prove Métis ancestry are additional evidence of this discrimination (Congress of Aboriginal Peoples, 2000: para. 38). These kinds of discrimination are, they suggest, exactly why section 35 was put in place and why the Métis were included in section 35 to begin with (Ontario Métis Aboriginal Association, 2000: para. 15; also see Aboriginal Legal Services of Toronto Factum, 2000: para. 11).

In a similar way, the Congress of Aboriginal Peoples argues that section 35 gives rise to principles of what it refers to as 'inter-societal justice', such that it (section 35) cannot be "interpreted in a manner that simply perpetuates historical injustices visited on aboriginal peoples in colonial times. It calls for a new departure, leading to a just settlement for aboriginal societies" (Congress of Aboriginal Peoples Factum, 2000: para. 17; also see para. 36). The Congress of Aboriginal Peoples notes the fragmentation of Métis communities is not the result merely of benign neglect on the part of governments but rather in some cases was the direct result of official policy, including "direct fragmentation of Métis communities by the *Indian Act*, which classified Métis persons as Indians", but also "by discriminatory attitudes, which drove Métis communities underground" (Congress of Aboriginal Peoples Factum, 2000: para. 33).

Position #3: effective government control

In a specific subset of the second position, the Congress of Aboriginal Peoples argues that in creating section 35 for this purpose, the Canadian government was doing no more than following centuries old British legal tradition. "When British colonizers encountered Aboriginal nations in North America, British policy was to leave aboriginal nations to live apart as distinct societies. The aboriginal societies were not absorbed into colonial policy" (Congress of Aboriginal Peoples Factum, 2000: para. 11). Likewise, the Congress of Aboriginal Peoples suggests that section 35 is "designed to regulate the intercourse between the various societies *inter se*, and also between each nation and the State" (para. 15), including the relationship between the Métis and the provincial and federal governments.

Theme #2 – Determining Métis Aboriginality

Position #1 – Locating Métis as Diluted Indians

The Ontario provincial Crown argued that the

> test for establishing Métis aboriginal rights should be substantially the same as the test established by the Supreme Court of Canada for Indian aboriginal rights, and may be summarized as follows: …
>
> > (b) the practice must have been a pre-contact practice of the Indian ancestors of the historic Métis community (Ontario Crown Factum, 2000: para. 6).

According to the provincial Crown, *Van der Peet's* logic is based on an attempt to protect and preserve the purity of pre-contact Aboriginal customs, traditions and practices, either in their original form or in some judicially accepted modification. Following the path set out in *Van der Peet*, the Crown argued that "aboriginal rights cannot be asserted where the practice is directly in response to European influences. To do so would be to undermine the purpose for which the right was granted in the first place" (Ontario Crown Factum, 2000: para. 64).

Thus, although the Ontario Crown was willing to acknowledge that Métis communities might possess section 35 Aboriginal rights, these rights stemmed not from a distinctively Aboriginal Métis culture but rather, from only those aspects of their culture 'Aboriginal' in nature. The Crown firmly located the Métis as obviously and commonsensically 'part' Aboriginal and 'part' European. This accords with broader contemporary sensibilities about the location of 'Métis' in Canadian society (see chapter one). The Crown holds this understanding of 'Aboriginal' – i.e. conflating it with 'Indian' – despite the term's distinct inclusion in section 35(2) of the *Constitution Act*, 1982 as separate from Indian: "in this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada". Be this as it may, the Crown took the position that any practices for which Métis claimants seek protection must possess broad similarities with geographically adjacent First Nations practices. This, we are told, is the only way to determine whether or not the practice is essentially Aboriginal. One cannot take the Métis community's word on it, precisely because their indigeneity is in question.

> The Métis came into existence after contact but early in Canadian history and may have occupied and used the land in a manner similar to their Indian ancestors. As well, they may have shared some cultural and other attributes with the Indians whose rights are recognized by virtue of pre-contact possession of the land. It is this close nexus between the Métis and their *aboriginal* ancestors which warranted the inclusion of the Métis in s.35 (Ontario Crown Factum, 2000: para. 76 – emphasis added).

Here, the conflation of 'Aboriginal' with 'Indian' is obvious – or at least, it is probably a conflation. To believe otherwise – i.e. to take the term literally such that the 'aboriginal' ancestors referred to are actually the Métis' Métis ancestors – would defeat the importance of the Ontario Crown's argument about Métis being part 'Aboriginal' and part European.

Having said this, the Ontario Crown did critique the idea of a distinct Métis culture in Sault Ste. Marie by leading its own expert witness into a discussion about whether the term Métis was simply an outsider term that lacked a self-identification element.

> (Long) Q. You just used the word Métis, how do you define a Métis?
>
> (Jones) A. For the purposes of this paper…I used a number of terms and terminology is always front and centre in these discussions it seems. I tended towards using the term mixed-blood which in itself has its own weaknesses and

> drawbacks and I did sometimes use the word Métis. The word that people called themselves or were called inasmuch as anyone can tell at the time, this time, the 19th Century, was Halfbreed and that phrase seems to have fallen out of favour for a variety of reasons, so I stayed away from that. I used the word Métis as another way of expressing the concept of mixed Aboriginal and non- Aboriginal ancestry. I'm not sure I want to import back to 19th Century people, some of the modern concepts that have become attached to the word Métis or say all of the cultural assumptions that have become attached to that word because *I'm not sure that all the 19th Century people would have recognized them all in themselves or about themselves* (Trial Transcripts, Vol. 5: 48 – emphasis added).

Similarly, the Crown sought to destabilize the idea of a distinctive Métis culture by demonstrating the extent to which the Sault Ste. Marie Métis community's cultural characteristics were shared by other non-indigenous communities. For example:

> (Long) Q. Within this area that you've described, what language was spoken?
>
> (Ray) A. The Native Ojibway, it's not clear when they're talking about Canadiene, whether they're talking...as I say Kohl gives us tantalizing hints of the possible existence, probably likely existence of the Michif language and French Canadian (Trial Transcripts, Vol. 2: 319).
>
> ...
>
> Q. So the answer to the question there's no single language must be yes then.
>
> A. Right (Vol. 2: 319-20).

And again,

> (Long) Q. ... Some of the factors, I think your terminology was some of the markers that distinguished a Métis from another Aboriginal and I'm not going to go through these at length, but you described a sash and you described religion, I think you said they were all Catholic, or almost all Catholic.
>
> (Ray) A. Certainly predominately Catholic.
>
> Q. Of course, as were the French living in this area.
>
> A. Ya, certainly the Métis were not the only Catholics in the world, that's for sure.
>
> Q. And those Métis whose parents had been, for instance, from English families presumably were of...of another religious tradition, is that correct? (Trial Transcripts, Vol. 2: 326)
>
> ...

> Q. And you described also I think something about fiddling. What did you mean by that?
>
> A. Métis fiddling music?
>
> Q. Yes.
>
> ...
>
> A. I was referring to the Métis musical tradition that's described by Chrétien in his...and it becomes a part of their voyageur culture and which Kohl describes, he doesn't necessarily say fiddling, but he's talking about the voyageur songs and the predominant instrument was the fiddle and again, not unique to the Métis to use a fiddle, but...
>
> Q. No, in fact it's a cross-cultural tradition is it not? Celtics...Celtic music in Cape Breton, same thing.
>
> A. Ya.
>
> Q. OK[89] (Trial Transcripts, Vol. 2: 326-7).

Yet even here, the Crown fails to mount a sustained argument regarding whether or not these historical community members were self-identifiably 'Métis'. They (the Crown) concede the issue and use the term themselves to apply to the mixed heritage individuals in the area, interchanging it with Métis (see Ontario Crown Factum, 2000: para. 12).

Later, the Crown again went after the Powley legal counsel's assertion of a distinctive Métis culture at Sault Ste. Marie by drawing similarities between, on the one hand, Métis practices and Ojibway practices and on the other, those of Scottish and English entrepreneurs (see Trial Transcripts, Vol. 2: 334-335). Clearly, these questions are rooted in an understanding of the Métis as 'part this' and 'part that' while by association, First Nations are not. This understanding of the Métis is also partially embedded in the thinking of the Powley legal team's expert witness. This issue comes to a head in one exchange in particular:

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[89] Ray responds to this exchange as follows: "But we...even though Celtics use it, you know, we don't deny [the Métis] a culture because they share it with somebody else". This sensibility accords with *R. v. Van der Peet's* (1996) argument that traditions can be distinctive without being distinct – that is to say, one need not prove that no other cultures engage in a particular activity, only that it represent a defining feature of the culture in question.

> (Long) Q. Dr. Ray, you were good enough to describe several factors and features of a Métis person as I had asked you before the break. I'm going to ask you now, what distinctive features or factors would you...would you note?
>
> (Ray) A. The music, dress, way of life and sort of a *multi-cultural, multi-racial* heritage. I mean, I understand the significance of your question, but in some ways I have the same trouble if someone were to say, well, define a Canadian, you know, and as an outsider to...to an outsider (Trial Transcripts, Vol. 2: 338 – emphasis added)[90].

Ultimately, the Crown's entire strategy is based on the belief that even taking for granted that the Powleys are Métis, Métis are not fully indigenous – they are 'part indigenous' and 'part European'. Or, to use the Crown's incorrect phrasing, part European and part Aboriginal. Hence, their worry that only "truly aboriginal practices" are protected (Ontario Crown Factum, 2000: para. 107) is based on a construction of Métis as diluted Indians. Clearly, being authentically Aboriginal is conflated with being Indian, such that Métis practices are or may be considered authentic to the extent that they mimic those of their First Nations relatives or neighbours. For the Crown, a 'full' Métis is only half an Indian. This position was also clear in their questioning of several of the Métis witnesses called to the stand to answer questions regarding the Métis community in and around Sault Ste. Marie.

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[90] The Crown employed their own expert witness (Ms. Jones); however, the bulk of the Crown's strategy appears to have been based on demonstrating a fatal break in the Métis community between 1850 and the late 1960s. Therefore, they asked few questions regarding whether a community existed in 1850; instead, the issue for the Crown was whether this community maintained its existence in the interim between 1850 and today. Ultimately, the Crown relied on its cross-examination of Dr. Ray to address the issue of an original Métis community at Sault Ste. Marie.

> (Christie) Q. OK. Do you recall when you started defining yourself as a Métis? As a Métis, I appreciate what you said earlier about always thinking of yourself as half Indian or part Indian, but when did you start to use the word...
>
> (Bennett) A. When I actually started using the word Métis? Probably ten, eleven years ago.
>
> Q. OK, and...and I just want to make sure I got your definition of what a Métis is right. My understanding is that you believe a Métis is...is a person with mixed Aboriginal and non-Aboriginal blood, is that correct?
>
> A. Yes

Later, with another Métis witness, the Ontario Crown asked why he thought he was Métis:

> (Christie) Q. I see. I appreciate that and...but...so your father told you when you were a child that he was Aboriginal?
>
> (Bouchard) A. He...he raised us like Aboriginal people.
>
> Q. Did...did he ever say to you I'm a...I'm an Indian or I'm a part Indian, I'm...
>
> A. He said there was Aboriginal blood as a lot of the people from Nestorville, the old people would say that the Bouchards have Indian blood[91] (Trial Transcripts, vol. 2: 39).

Position #2 – Métis are 'fully Aboriginal'

The Powleys' legal counsel took the position that by the time of the magical chronological cut off date – a date which, incidentally, differs significantly depending on the geographical location of the offense – the Métis community at Sault Ste. Marie, ON was fully established, its members living a distinctive Aboriginal lifestyle. Unlike the Ontario Crown's position, this section is longer and far more descriptive. This is due to the fact that, according to the framework set out in *R. v. Sparrow* (see chapter three) to construct section 35 Aboriginal rights arguments, Aboriginal claimants must prove they were acting pursuant to an Aboriginal right. Thus, a bulk of the evidence regarding Métis culture was forwarded by the Powleys' legal defense team, who were placed in a tricky position. Proceeding according to *Van der Peet's* logic required that they demonstrate *both* that the historical Métis community and culture in the Sault Ste. Marie area shared broadly similar characteristics to other indigenous communities in the area (particularly the Ojibway) but also that it was still distinctively Métis.

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[91] Bouchard's answer to an earlier question, asked by the Ontario Crown, goes to the heart of the fears of both non-Aboriginal people who are against Métis rights and other Métis who self-identify with a specific set of Métis cultural symbols.

> Q. Did [your parents] know they had Aboriginal ancestry?
>
> A. Yes, they did.
>
> Q. And did they tell you that?
>
> A. Yes, my mother used to tell us her Great Grandmother was an Indian princess (Trial Transcripts, vol. 1: 372).

In their attempt to negotiate this thorny issue, the Powley lawyers argued that "[a]lthough the Métis shared many customs, practices and traditions of the Ojibway, they were distinctive and separate from the Ojibway. The Métis society was not simply an adjunct to either the Ojibway or European societies" (Powley Factum, 2000: para. 58). In both his expert report and testimony, the Powley lawyers' primary expert witness Dr. Arthur Ray paints a picture of economic life in the whole Upper Great Lakes region at contact, in the early 1600s. Ray states that Ojibway life in this area consisted of a mixed diet including fish, small and large game animals, wild rice and maple sugar. Efficiently garnering these food resources, the Ojibway moved seasonally between their shoreline fishing villages and their winter ranges (Ray, 1998: 14; Trial Transcripts, Vol. 2: 146-9). More importantly, Ray suggests that Ojibway life was characterized by a vibrant hunting and fishing economy, an important step in validating the hunting practices of adjacent Métis communities.

In 1649, responding to various pressures of an over-trapped territory and perceived threats from other nations, the Iroquois attacked the Huron, largely destroying Huronia and scattering nations allied with the Huron north and west into the Upper Great Lakes area (Ray, 1998: 16; also see Peterson, 1985). Half a decade later, the French began to re-establish trade links with these scattered tribes, establishing official ties in 1654. During this time, unlicensed *coureurs des bois* established additional, unofficial ties, setting the stage for the intermarriage between French traders and Ojibway women (Ray, 1998: 16). This intermarriage, coupled with the lively regulated and unregulated competition between the Hudson's Bay Company (British) and North West Company (Scottish and French), led to the recruitment by the North West Company in the Montréal area of French labour to staff the growing number of fur trade posts in the Upper Great Lakes area. Significant numbers of these French trade post workers married into the local Native population, and by the late 1700s a large 'mixed-blood' population had arisen in the Upper Great Lakes region (Ray, 1998: 16-19). More importantly, however, is the claim that although these communities were 'new', they were nonetheless broadly Aboriginal in character, meaning they lived close to the land, engaging in conventionally 'indigenous' practices.

> *Métis* are the descendents of the early fur traders and Indians. Those descendents evolved into a new Aboriginal people through a process called ethnogenesis. Even though the *Métis* did not, as a people, predate the arrival of Europeans, they were organized into societies and had strong relationships to their land and waters before Canada crystallized as a country (Powley Factum, 2000: para. 30 – emphasis added).

Most interesting about this passage is the Powley legal team's use of the term 'Métis'. In fact, as evident in the Ontario Crown's position this issue raised some discussion about whether the 'mixed-blood' community at Sault Ste. Marie should be considered 'Métis'. Until recently, the history of the Métis has been the *national* history of Louis Riel and the Red River Métis (Peterson, 1985). Little discussion has occurred regarding Métis culture and communities outside of this geographical locale. Jacqueline Peterson, acknowledged as a leading expert on the Upper Great Lakes mixed blood populations, suggests that a nationalist Métis consciousness did not ensue until about 1816 (Peterson, 1985: 37). She argues, however, that this Métis nationalism 'so suddenly birthed' during the Battle of Seven Oaks in 1816, that was not merely a fabrication but rather "must [have] depend[ed] upon a core of experiences and characteristics held even if not yet fully recognized in common" (Peterson, 1985: 38). Prior to the nineteenth century rise of the Métis Nation, Métis society was "a society whose members – *if not self-consciously Métis before 1815 – were a people in the process of becoming*. We know this because their distinctiveness was fully apparent to outsiders, if not to themselves" (1985: 39 – emphasis added). A line in Ray's expert report appears to confirm the ambivalence of the category 'Métis': "...it should be noted that some individuals moved back and forth across the fluid 'Indian' and 'Métis' cultural boundary" (Ray, 1998: 8). Another of the Powley legal team's expert witnesses brought this issue to the fore later in the trial:

> (Teillet) Q. Now, and again, the people that the Chief might bring in, under what you've described as family, would that mean that they were...did that mean they were Indians or could it mean still they're Métis, what...what's...what is it that you see?

> (Armstrong) A. The Aboriginal people really didn't view themselves as being Indian or Métis. They just viewed themselves as a high...(inaudible)...group of people who looked after each other and if the Chief was related, well then he made sure that he took care of them (Trial Transcripts, Vol. 4: 62).

The Powleys' legal team sought to deal with this issue by arguing that "whichever term was used – "half breed", "chicot", "bois-brûlé" or "Métis" – the people referred to are the same" (Powley Factum, 2000: para. 7). Further, they suggest that the term 'Métis' is appropriate because "it reflects the preferences of the *contemporary* Métis community at Sault Ste. Marie" (2000: para. 8 – emphasis added). Moreover, they were quite open about the term's ambiguity during the trial.

> (Teillet) Q. Mr. Belcourt, is Metis the word that the people themselves use to describe themselves?
>
> (Belcourt) A. Not originally, no. Especially when we were growing, when I was growing up or before people were in contact with the English language in particular, we tended to use our own languages to describe who we were. The Indian people had a way of describing who we were and so did the non-Indian people, so we would call ourselves Apeytogosan, Nahio, depending on where we were or what we were doing at the time, circumstances. Nahio is simply of the people. Apeytogosan means people who are their own bosses, people who take care of themselves. The Cree had a word for us, it was Otay-pym-sewak, the people who lived over there on their own because our communities were distinct from both the non-Indian and Indian communities and the non-Indian people had these other words, especially the French, they called us the Métis and the Indians called us Half-breeds (Trial Testimony, vol. 1: 59).

Additionally, Ray suggests that "[b]y the early nineteenth century HBC journalists used various terms to identify people of mixed ancestry. Most commonly they called them **'half-breed.'** They also used the term **'Canadian,'** which usually, but not invariably, signified people of French Canadian/Native ancestry" (Ray, 1998: 7 – bolded in original). Clearly, the Powleys' lawyers used the term 'Métis' to include all mixed descent people in the Sault Ste. Marie area, whether or not they self-identified as such.

Equally clearly, self-identification – normally a hallmark of contemporary identity constructions – plays little role in this court construction.

> (Teillet) Q. Now, Dr. Ray before we get into your actual report, I'd like to sort of paint a little bit of a...little bit of language and background before we move on. Can you and as you have in your report beginning at the...you do discuss, I'm trying to find the part where you discuss the terminology, the different names...
>
> (Ray) A. OK, well one of the problems with doing Métis history and it's not unique to the Métis I should add, but it's certainly a particular problem with the Métis people is that there are a whole series of different names applied to them, so when certain terms appear in historical record, you always have to look at the context in which the word is used or the term is used and in doing that, one also has to understand that almost all of these names were not names that the Métis called themselves, these are terms being applied to them by outsiders, usually visitors and/or in the case of traders, sometime long-term trading partners, so there's a whole series of names that are used. Probably the best known name apart from Métis itself, which is the name that…is one of the common names for these people that appears in the record from French sources if Half-breed appearing from the English source (Trial Transcripts, Vol. 2: 140-1; also see Jean Teillet's (one of the Powleys' lawyers') cross-examination of Ms. Jones, Vol. 5: 82-3).

The Powleys' lawyers' wording regarding the issue of the Sault Ste. Marie community is also noteworthy. In discussing this community, they write "[t]his new people evolved out of a true blending of both cultures – Ojibway and European – into a new Aboriginal people *which we now call* the Métis people" (Powley Factum, 2000: para. 55 – emphasis added). Their position is that the Sault Ste. Marie mixed blood community was an Aboriginal people, that the hunting practices for which the Powleys sought protection constituted an integral feature of their ancestral community and that they continued to constitute an important feature of the contemporary community at Sault Ste. Marie. Moreover, this historic community, although sharing important commonalities with their Ojibway neighbours, was nonetheless distinctively Métis. "The Métis people at Sault Ste. Marie area have always lived peacefully with or near their

Ojibway relatives. They share many customs, practices and traditions, *but they are not Ojibway*" (Powley Factum, 2000: para. 55 – emphasis in original).

> All of the experts at trial testified that the Métis people were…a recognizable group of Aboriginal people with a distinctive lifestyle that was recognized by others. Although the Métis shared many customs, practices and traditions of the Ojibway, they were distinctive and separate from the Ojibway. The Métis society was not simply an adjunct to either the Ojibway or European societies (Powley Factum, 2000: para. 58).
>
> (Ray) A. The problem with the term Half-breed or mixed-blood and Half-breed is the term the English people travelling through this period are commonly using to the Métis. It implies that just half of this and half of that is what a Métis is. It overlooks the fact that *the Métis culture was a creative result of a mixing of those two in language, art and song and a way of life, so it wasn't just half this and half* that and I think that would be the major point that I would make (Trial Testimony, Vol. 2: 250 – emphasis added).

A similar point was raised by Tony Belcourt in the Powleys' legal team's questioning:

> (Teillet) Q. Mr. Belcourt, are the Metis a race? Is it a racial concept?
>
> (Belcourt) A. Very definitely. We believe so. We are a distinct people with distinct history, culture, languages and values that while they may not be exclusive, collectively they are distinctly Metis.
>
> Q. And is it an ethnic group?
>
> A. I would...yes, I would say.
>
> Q. And what about the issue of blood quotient?
>
> A. It never is a factor for us. Never.
>
> Q. Can you lose your Metisness by continually marrying into the non-Métis community?
>
> A. No. The essential pre-requisite for us is that an individual must identify as Métis. That's number one and it's...we don't identify people as Métis. Métis people identify themselves with the Métis community. …they say, I am Métis (Trial Transcripts, vol. 1: 62).
>
> And later,

> Q. Now, Mr. Belcourt, as a start in trying to define who the Metis are for the purposes of this case, can we start by saying that...that it refers to persons of mixed Aboriginal and European ancestry?
>
> A. No.
>
> Q. No. Why not?
>
> A. I don't look upon my mother as mixed. My mother was Métis. My father was Métis. My Grandparents were Métis and their parents were Métis. I don't consider myself or any of them as being part this or part that. They are a whole person who comes from a line of whole people. There are in our communities, some people who...who might come from parents today, one being a Status Indian person and we don't know whether or not that person's mixed or not, but Status Indian person and non-Indian person, non-Status person that is non-Aboriginal say, who would be entitled to register in the Métis Nation, but I don't think those people look at those parents as being anything other than what they are and themselves as being Métis. They describe themselves and define themselves as being Métis. It's not a pre-requisite in the Métis Nation that you say well, I am a...I am a mixed-blood person. If that was the case and it was simple as that, the vast majority of Status Indian people in Canada would qualify as Métis (Trial Transcripts, vol. 1: 66-7).

Instead, and as required by the *Van der Peet* test, the Powleys' legal counsel point to several distinctive social (rather than genetic or 'blood') features which set Métis communities apart from their Ojibway neighbours, including: musical traditions, distinctive modes of dress, religion, a distinctive language and employment (see Trial Transcripts, vol. 2: 242-7; Ray Report, 1998: 19).

In differentiating between the Métis and the Ojibway of Sault Ste. Marie, Ray ultimately suggests that:

> Métis families living along the shores of Lake Huron and Lake Superior earned their livelihood by working full-time or seasonally for the trading companies, engaging in small-scale farming activities, fishing, trapping, hunting, and collecting. Their Ojibwa neighbours and relatives lived a similar existence, but placed a heavier emphasis on fishing, hunting, and trapping for commercial and subsistence purposes (Ray Report, 1998: 20).

The Powleys' lawyers presented each of these characteristics as markers of a distinctive Métis culture. Thus, Métis Aboriginal rights are not derived, as the Crown suggests, from the practices of their Indian ancestors but rather "from the practices, customs and traditions of their historic Métis society" (Powley Factum, 2000: para. 50). That is to say, contemporary Métis seek protection for their Aboriginal right to hunt for food based on the fact that an ancestral Métis community engaged in these activities, not because an historical (and geographically proximate) First Nations community also happened to engage in the same activities. Suffice it to say for now, however, that the Powleys' lawyers make a deliberate link between the Métis of Red River and the community living at Sault Ste. Marie by referring to them collectively as 'the Métis'.

> It was in the 19th Century that the Métis people first began to assert *their* existence as a people with rights. *They* sought to organize *their* people. The assertion of rights by the Métis and Ojibway at Mica Bay near Sault Ste. Marie in 1849 [was] cited by the experts at this trial. Later events at Red River in 1870 and Saskatchewan in 1885 are well known (Powley Factum, 2000: para. 34 – emphasis added).

Position #3 – Métis are an Aboriginal people

The Powleys' legal team spends relatively little time discussing the relationship between the Métis community at Sault Ste. Marie, Ontario and their relationship to a larger Métis collective, other than by inference (as, for example, in the immediately preceding paragraph). The Métis National Council deals with the issue more directly. Defining the Métis Nation as "The historic collective of Métis people who lived and still live in what is north central North America" (Métis National Council Factum, 2000: para. 11), they include the Sault Ste. Marie, Ontario region as part of what they refer to as the 'Métis Nation homeland' (para. 11). Interestingly, rather than focusing on the

'Aboriginal' in Aboriginal peoples, the Métis National Council focuses directly on the 'peoples'. "Section 35(2) provides the explicit enumeration of three distinct Aboriginal "peoples"… The MNC submits that the existence of a pre-existing people, flowing from a distinct Aboriginal collective identity, is at the core of s.35's protection" (Métis National Council Factum, 2000: para. 15).

Moreover, in suggesting the existence of the Métis as a people, the Métis National Council present a number of characteristics recognized in both domestic and international law; "objective elements can include: common language, history, culture, race or ethnicity, way of life and territory. In addition, a subjective element is necessary, whereby a "peoples" identifies itself as such" (Métis National Council Factum, 2000: para. 16). The Métis National Council suggests that the Métis Nation's history demonstrates each and all of these indicators prior to the effective control asserted by the Crown (para. 17) and suggests that at various times in its history, the Métis Nation was willing to stand up and fight for their collective existence (para. 21).

Theme #3 – Dating Métis Aboriginality

Position #1 – Post-contact communities, still pre-contact practices

The Crown spends little time on determining whether a distinctive *Métis* culture existed at Sault Ste. Marie in the early nineteenth century. The passages noted above constitute their only serious attempt to challenge that notion. However, they did attempt to determine *when* Métis indigeneity is fatally flawed by European influences. That is to say, if all the legal actors agree that the *Van der Peet* test should be interpreted flexibly to allow the possibility of protecting Métis practices, the Crown argues that it is crucial to pinpoint an appropriate cut off date for considering Métis authenticity as Aboriginal peoples. They agree that some flexibility must be allowed but that the court must continue to respect the overall purpose of section 35, namely, the protection of the Métis' Aboriginality. Therefore, although in the interest of justice a 'short post-contact period' should be granted to allow Métis communities to emerge, "[t]he question is how long. It is submitted that the period of time must, as much as possible, respect the Supreme Court of Canada's setting of very early cut-off dates for identifying "aboriginal" practices in the Status Indian context" (Ontario Crown Factum, 2000: para. 80).

At the heart of the Ontario Crown's argument is the idea that the presence (or, perhaps more complexly, the influence) of European lifestyles irreversibly taints the indigeneity of First Nations and Métis communities. The case of the Métis of Sault Ste. Marie is particularly interesting because it requires the Crown to create a distinction between the presence of Europeans (i.e. contact, the hallmark of the majority opinion in the *Van der Peet* decision) and the *imposition* of European culture. In arguing that the appropriate date for determining Métis indigeneity is that of effective sovereignty as opposed to prior to contact (or for that matter, effective control), the Crown borrows from Supreme Court of Canada justice McLachlin's dissenting logic in *Van der Peet*, where she argued that "Aboriginal rights do not find their source in a magic moment of European contact, but in the traditional laws and customs of the aboriginal people in question, which existed prior to the *imposition of European law...*" (*R. v. Van der Peet*, 1996 – emphasis added).

Using this logic, the Ontario provincial Crown argued that such a flexible interpretation of the *Van der Peet* test would recognize historical Métis communities and their practices (Ontario Crown Factum, 2000: para. 81). Hence, "[w]hat is relevant to setting the date by which the Métis community must exist is that there must be a close temporal connection between the pre-contact aboriginal society and the emergent Métis society, and that the Crown has not effectively asserted sovereignty over the area" (2000: para. 82). The Ontario provincial Crown argues that although determining effective sovereignty can be difficult, the courts may look to "the date of the first European trading post, mission, or permanent settlement, the drawing of political or international boundaries, the extinguishment of aboriginal title by Indian treaty, the surveying of a colonial townsite, or the establishment of colonial courts" (Ontario Crown Factum, 2000: para. 82) as markers for making such determinations. Thus, for the Crown, it is the 'early occupation' of Métis communities which allow contemporary descendents to assert section 35 rights.

At first blush, it seems as though the tipping point moved slightly from one in which indigenous culture is so fragile that the mere presence of Europeans is enough to ruin it, to one in which a more robust indigenous culture maintains its chastity, able to fend off the initial, fumbling advances of European 'civilization'. Ultimately, however, incorporating the Métis as an indigenous people does not require this movement. Instead, the Ontario provincial Crown argues that while Métis cultures may be allowed to change, the particular practices eligible for section 35 protection may not. Thus, Métis communities who are able to demonstrate a pre-effective sovereignty presence, must still demonstrate that the practices for which they seek protection are rooted in the pre-contact practices of their ancestors.

> While it has been accepted that, in the Métis context, pre-contact may not be an appropriate time to ascertain whether a community exists, it is submitted that the

> question of which type of aboriginal practices are protected must follow the established principles applicable to Status Indians. Specifically, only the pre-contact practices of the Indian ancestors of the Métis should be protected under s.35" (Ontario Crown Factum, 2000: para. 85).

Position #2 – Colonial Government's effective control[92]

In pinpointing the appropriate period for considering the indigeneity of Métis communities, the Powleys' lawyers argue that Métis indigeneity cannot, obviously, be held to the pre-contact standards set out in the *Van der Peet* test. To wit: "[t]he contact test in its strictest sense – when Europeans arrived in North America – makes no sense when applied to the Métis who are recognized within our Constitution as an Aboriginal people, but who arose *after contact*" (Powley Factum, 2000: para. 64 – emphasis in original; also see Aboriginal Legal Services of Toronto Factum, 2000: para. 16). Instead, they argue that the line of logic raised the Supreme Court of Canada decision *R. v. Adams* (1996) was more appropriate, namely, the period of effective control (Powley Factum, 2000: para. 65). The chronological distance between contact and effective control in the Upper Great Lakes region is vast. While the Jesuits established a small presence in the Sault Ste. Marie area as early as the beginning of the seventeenth century, the date of effective control was not established until far later, during the mid-nineteenth century (Ray, 1998; also see generally Lytwyn, 1998).

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[92] Although not raised in their respective factums and although we might believe that, given the fixed date of 1850, effective sovereignty rather than effective control amounts to a distinction without a difference, effective sovereignty (i.e. the effective ability to exclude other European powers from exerting their sovereignty in a particular geography) is a somewhat different issue than the ability of a European power to exert 'on-the-ground' control (i.e. effective control). I would like to thank Claude Denis for his discussion on this issue.

Part of the Powley lawyers' argument was based on undercutting the notion of 'contact' which anchors *Van der Peet*'s pre-contact criteria. That is to say, although it appears to be a straightforward concept, European technology – and thus, culture – was in contact with Aboriginal communities as long as a century prior to actual physical contact.

> (Teillet) Q. Do we have any idea of who came here and...first and when?
>
> (Ray) A. Well, you know, when we raise the issue of contact, we raise a real thorny one because at first blush it seems like a very simple idea. Contact's when the first European shows up, right? Well, the question then one would ask oneself is, why would that matter? The underlying assumption behind the question is that when Europeans arrived, they begin to influence Native cultures as they had been before Europeans arrived. But, OK, so that's the reason we're interested, so then the real question should be when did Native cultures begin to feel the effects of the arrival of Europeans in North America? The big problem we have and I think it's going to be an increasing problem for applied and practical reasons is that the...it's...we all know now that the influence of the European presence on the continent influenced Aboriginal people and in many cases, fifty to a hundred years before the first Europeans set foot and started describing the culture. So that, very, very rarely except the first ship that arr...maybe Cabot, 1497 and somebody like that, most Europeans when they first arrive in an area and start describing the Native cultures, they're describing cultures that are no longer "pristine" (Trial Transcripts, vol. 2: 167; also see Powley Factum, 2000: para. 67).

The Powleys' legal team's point is that as much as many of us would prefer to construct an image of authentic indigeneity as existing prior to contact, legal tests which rely on actual person-to-person *physical* contact fail to account for the fact that indigenous communities had already been involved in 'culture swapping' with European groups for (in some cases) centuries. In other words, the much trumpeted pre-contact / post-contact point is already rendered problematic by the extensive pre-contact trade networks which reached from the sub-arctic areas of what is now Canada to the Mississippi valley (see Dickason, 1992). Thus, to argue that the indigeneity of Métis practices is automatically suspect because of their post-contact origins is to forget that first physical contact between 'European' and 'North American' First Nations was already presaged by close to a century of cultural intermixing. The important point advanced by the Powleys' lawyers is that "while some artefacts of European culture were incorporated into the Aboriginal cultures, the practices, customs and traditions remained Aboriginal" (Powley Factum, 2000: para. 67). If we take a more robust view of Aboriginal culture (as the Powley lawyers do), the Métis communities which sprung up soon after contact are not necessarily any more tainted than their geographically proximate neighbours. If true, it is a small stretch to argue that Métis cultural practices are indigenous because the Métis engage in them and not because their Indian ancestors did.

Position #3 – Shared government institutions

The Congress of Aboriginal Peoples champions the third position but offers only tantalizingly brief glimpses of the model of Aboriginality underlying their construction. They argue specifically that the principles required to construct a relevant time frame for perceiving Aboriginal rights are based on the point at which the

> Crown assumed effective governmental (and fiduciary) responsibility for the Métis people. This requires a substantial Métis presence *and shared governmental institutions.* In this case, these conditions would not have occurred until the formation of Ontario in 1867 (Congress of Aboriginal Peoples Factum, 2000: para. 23 – emphasis added).

This construction is similar to that forwarded by the Powleys – it differs, the Congress of Aboriginal Peoples tells us, insofar as "sheer force of numbers" (para. 25) and "crude force" (para. 26) is not by itself sufficient to assimilate a distinctive Métis culture. What such a test fails to acknowledge is the often *shared governmental institutions* which emanated in the era immediately following government attempts at effective control. That is to say, while both the Crown and the Powleys' legal counsel appear to suggest that the effective control by government fatally interfered with Métis political / governing institutions, the Congress of Aboriginal Peoples opened the door to the possibility that the cultural transmission occurred in reverse: that is to say, that upon effective control, colonial government borrowed from indigenous governing practices as well as imposing their own upon them. This is an intriguing argument, but the Congress of Aboriginal Peoples' factum offers no evidence that these social processes were in evidence during the time period in question (the mid-nineteenth century).

THE FINAL WORD: THE DECISION OF THE COURT OF APPEAL FOR ONTARIO

Clearly, since theirs is the final word, the most dominant position-taking within the judicial field is that of the appeal court justices. Judicial decisions consist of weaving together participating legal actors' discourses with lay and expert witness testimony, expert reports and relevant principles, judicial conventions, (in this case) constitutional precedent and the judge's own embodied understanding of balancing competing interests. To repeat our characterization of the courts in chapter two, the judicial field consists of judges situating themselves within the discursive terrain of a particular case, including each of the elements just mentioned, and writing decisions which reflect their choreographic interpretation and sense-making of the cacophony of competing discourses before them. In this sense, judges act like orchestra conductors – they 'make the music', so to speak, but only within the limitations of the existing sheet music and the musicians in attendance.

The appeal decision itself is 179 paragraphs or 52 pages, not a particularly long decision by Court of Appeal standards. Moreover, given the complexity of the legal tests involved and a number of side issues relating to the length of the trial and arguments over the introduction of new evidence, large swaths of the decision are irrelevant to the present research. We will, however, discuss in more detail the three themes identified at the beginning of this chapter:

Theme #1 – the purpose of including Métis in section 35 of the 1982 Constitution Act

Recall that the difference between the Crown's position and those of all other legal actors is based on a discussion of how judges should read section 35 rights. That is to say, the Ontario Crown wishes the courts to apply a straightforward application of the *Van der Peet* test, such that the purpose of section 35 rights is to protect that which (according to them) makes Métis Aboriginal – their Indianness. Conversely, the Powleys' legal counsel and the Aboriginal interveners emphasize a purposive reading of section 35 which takes into account the discrimination endured by historical Métis communities, of which the current lack of parity between Métis and First Nations hunters is but one example.

The Court of Appeal for Ontario rendered a unanimous decision; Appeal Court Justice Sharpe wrote the decision on behalf of himself, Justice McMurtry and Justice Abella. With respect to understanding the purpose of section 35, Sharpe notes two purposes: the recognition of prior Aboriginal occupation by 'distinctive Aboriginal societies' and second, the reconciliation of contemporary Crown sovereignty with this prior occupation (Court of Appeal, 2001: paras. 77-79). Moreover, Justice Sharpe suggests that a purposive analysis of section 35 rights must interpret the evidence in a liberal and generous manner (para. 80) and in light of these interpretive principles, argues that "[t]he very concept of prior occupation that lies at the heart of aboriginal rights *necessarily* requires modification to deal with the distinctive history of the Métis" (Court of Appeal, 2001: para. 94 – emphasis added). Moreover, he notes that the majority in *Van der Peet* raised the possibility of modifying section 35 rights to deal with the distinctive position of the Métis.

Interestingly, Justice Sharpe managed to reach the same conclusion as all other legal actors but without tipping his hand regarding how the court will deal with the Métis' distinctive history. Certainly, the Appeal Court for Ontario decision contains none of the rhetoric present in the Ontario Superior Court opinion about the discrimination faced by Métis in the past, nor does Justice Sharpe incorporate the wording in the *Sparrow* decision which admonishes the (in this instance federal) Crown for their earlier injustices against Aboriginal communities. Yet the effects of his 'liberal and generous' interpretation are the same, in that he 'necessarily' modifies the *Van der Peet* decision to incorporate Métis section 35 claims, as per the interpretive proscriptions demanded by section 35.

Theme #2: Determining Métis Aboriginality

Three positions on Métis Aboriginality arise from the *Powley* court files. The first conception, forwarded by the Ontario Crown, is that section 35 can only protect parts of Métis culture which are Aboriginal in nature. For the Crown, Métis are 'mixed': 'part' Aboriginal and 'part' European. In this context, Métis Aboriginality stems from its First Nations background. The sum total of this equation is that Aboriginal equals First Nations. Conversely, proponents of the second position argue that Métis are fully and distinctively Aboriginal and they ask the courts to recognize this distinctiveness. For example, the Powleys' legal team argued that the Métis community at Sault Ste. Marie in 1850 was an identifiably Aboriginal community, similar to yet distinctive from other communities. They noted various similarities to the Ojibway communities in the Sault Ste. Marie geographical area, but also took pains to demonstrate their differences, including musical traditions, dress, religion, language and employment. The Métis National Council, although agreeing with the arguments presented in the Powley factum, presented a more radical third position, with their nationalistic account of Métis (*the* Métis) – we discuss the extent to which discourses of nationalism are accepted in the final Court of Appeal for Ontario decision.

To a certain extent, the legal outcome of the case depends on whether or not the court 'buys' the Métis as Aboriginal – a good part of the *Powley* factum is based on walking the tightrope between demonstrating the distinctiveness of their culture[93] while continuing to prove their indigeneity. It is crucially important for them to demonstrate both sameness and difference – the activity they engage in must be suitably similar to those of First Nations communities but must also be shown to spring from a distinctively different Métis community.

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[93] It is clear, however, that the counsel for the Métis defendant incorporates a slightly different understanding of culture, one where it 'seeps' into geographical areas and exerts an impact on *everyone* in the area, indigenous and otherwise. Though not evident in their factum, the Powleys' legal team would necessarily argue that Ojibway culture, no less than Métis, underwent tremendous cultural change during the proto-contact period (and in fact do so in their Supreme Court of Canada factum). In this way, the Powley lawyers reduce the cultural differences between Ojibway and Métis while lending just enough evidence to give credibility to the idea that the Métis communities were distinctive.

In rendering a decision, Justice Sharpe followed the logics presented by both the Powleys' legal team and the Ontario Crown. The trail of this reasoning is set within the boundaries marked out by the work of Dr. Arthur Ray (expert witness for the Powleys). Justice Sharpe begins by emphasizing the traditional use and occupation of the Sault Ste. Marie area by Ojibway communities prior to the seventeenth century. Following closely Dr. Ray's framework, Justice Sharpe observes the influx of French traders into the region and the eventual *marriages à la façon du pays* in the late seventeenth century. The court notes further that, by the late 1700s, "the mixed-blood families begin to evolve into a new and distinct Aboriginal people through a process known as ethnogenesis" (Court of Appeal, 2001: para. 18). Quoting the Royal Commission on Aboriginal Peoples and the factum of the Métis National Council, the justices locate the Métis community at Sault Ste. Marie as part of the larger 'Métis Homeland' (Court of Appeal, 2001: para. 18).

Following a largely uncontroversial historical narrative, Justice Sharpe discusses the subsistence hunting and fishing practices of the Métis. He notes their similarity to those of their Ojibway neighbours, yet also observes the Métis community's 'distinctive niche' in the fur trade economy in the Sault Ste. Marie area. According the Court of Appeal, the Métis "evolved into a distinct Aboriginal culture with its own community structures, musical tradition, mode of dress, and language – Michif – a blending of French, English and Aboriginal [sic] sources" (Court of Appeal, 2001: para. 19). To this point in the Court of Appeal decision, however, Justice Sharpe tells us very little about what makes Métis practices Aboriginal. Both the Crown and the Powleys' legal team agree that by the middle of the nineteenth century a distinctive culture was evident in the Sault Ste. Marie area.

Now, the crux of the difference between the Powleys' legal team and the Ontario Crown is whether Métis cultural practices should be understood as derivative of those of their First Nations ancestors, or whether the distinct culture that sustained the Métis communities in the Sault Ste. Marie region should suffice as a basis for an articulation of the Aboriginality of those rights. This is *the* critical issue, in fact, because it goes to the heart of deciding whether or not Métis are an Aboriginal people in their own right, or whether they are mere fragments of an earlier, purer 'whole'. Although the Métis obviously do not meet the *Van der Peet* test in the strictest sense, the Court of Appeal is sympathetic to this issue, not least because as discussed earlier, broad agreement exists among the legal actors that the *Van der Peet*'s pre-contact criteria needs to be loosened to allow the Métis to receive constitutional protection (Court of Appeal, 2001: para. 95).

In presenting their understanding of the Ontario Crown's argument, Justice Sharpe makes a small slip of the pen. Or perhaps more generously, he accurately records the Ontario Crown's previous slip. Justice Sharpe argues that "if the [Ontario Crown's] submission is accepted … Métis claims are, in effect, derivative and entirely dependent upon the claims of their *Aboriginal* ancestors" (Court of Appeal, 2001: para. 98 – emphasis added). Note his use of the term 'Aboriginal' as opposed to what he likely meant, namely Indian or First Nations ancestors. A minor slip, perhaps, but one necessary to sustain the model of indigeneity constructed several paragraphs later.

Instead of 'choosing sides' in this decision, Justice Sharpe avoided a direct legal construction of the issue of Métis Aboriginality by arguing that it was outside the factual confines of the case. That is to say, since both sides agreed that the practice engaged in by the *Powleys* was characteristic of both the Métis historical community *and* of pre-contact Ojibway practices, Justice Sharpe decides the court is not required to characterize the activity as either distinct or derivative, as the factual evidence supported both characterizations.

> On the facts of the present case, it is not necessary to decide this question. It is conceded by the appellant that the Ojibway ancestors of the Sault Ste. Marie Métis did engage in the practice of moose hunting and accordingly, even if the Métis right depends upon a pre-contact practice, the issue will not be determinative of this case (Court of Appeal, 2001: para. 100).

Given the novelty of judicial reasoning in this area of Aboriginal rights, and that the facts could be given multiple interpretations, perhaps Justice Sharpe was well within his rights to stop at this point. Yet, he did not. In noting that "this issue goes to the heart of the nature of the Métis rights protected by s. 35 and to some extent, informs the entire interpretive and analytical exercise", Sharpe added several *obiter* comments. He began with a reiteration of the rules of interpretation underlying constitutional Aboriginal jurisprudence, which require that he provide a broad and generous interpretation of the facts before them. In turn, this requires him to treat Métis people as equal to 'Indians' and Inuit – as one of three distinct subsets of Aboriginal people recognized in the *Constitution Act of 1982*. In addition, Justice Sharpe explains that Métis rights, although recognized in the same source as First Nations Aboriginal rights, are by no means subservient to them. In other words, so far, so good; the legal shell for a distinct Métis culture is alive and well, safe in the purposeful reasoning underlying this train of thought.

Soon, however, cracks appear; though wheels have not yet fallen off, the court provides a foreshadowing of the wreckage of Métis 'equality' that appears, in a twisted heap, a paragraph later. Almost in passing, Justice Sharpe remarks that "[o]f course, one cannot ignore that section 35 rights protect "aboriginal" rights, and that it is the aboriginality of the Métis that is constitutionally protected…it seems difficult to justify "an entirely distinct second order of Aboriginal rights held by new social entities that did not exist when the European-based order first asserted jurisdiction"" (Court of Appeal, 2001: para. 103). Pause for a moment to think about this. Recall that the term 'Aboriginal' holds a precise legal meaning – this issue arose earlier in our discussion of the Crown's position. The term refers to three distinct groups of people: Indians, Inuit and the Métis. Therefore, the Métis are recognized as Aboriginal, due, at the very least, to their inclusion in section 35(2). If this is the case – if the Métis are themselves Aboriginal – it is unclear, as a matter of logic, how their 'aboriginality' can be in question.

In the following paragraph of the court decision, we see the full results of Justice Sharpe's reasoning. He suggests that "[a]s the Métis culture was not a mere "cut and paste" affair, it may well be difficult in some cases to determine whether a Métis practice, custom or tradition was inherently Aboriginal in nature" (Court of Appeal, 2001: para. 104). Apparently, Métis are not themselves 'inherently Aboriginal' and hence, the Court of Appeal is in a conundrum. If Métis are an equal and distinct subset of Canada's Aboriginal people, what is it about their culture that marks them as suspect, raises the spectre that perhaps some of their practices are *not* Aboriginal in nature? Although unsure, the Court of Appeal proposes a legal solution. They suggest that "one would expect the nature of Métis rights to correspond in broad outline with those of Canada's other Aboriginal peoples…arising from the distinctive relationship the Aboriginal peoples have with the lands and waters of their traditional territories…" (Court of Appeal, 2001: para. 104). The Appeal court is quick to assure us, however, that Métis are a distinct and equal subset of Canada's Aboriginal people and therefore, their position may not be subservient to that of Canada's First Nation's people.

Although it may not seem so upon first reading, Justice Sharpe's construction of Métis Aboriginality is rooted in logic similar to that proposed by the Crown: Métis are not 'inherently Aboriginal' and therefore must be compared to "other Aboriginal peoples" to be certain their cultural practices align with *legitimate* Aboriginal culture. Since it is unlikely that Sharpe will look to Inuit practices to determine their authenticity[94], he ends up looking through the same analytical lens as the Crown, namely First Nations practices. More precisely, he will examine the practices of their First Nations neighbours and especially those with pre-contact roots. In only a handful of paragraphs, the Métis – 'an equal subset of the larger class of Aboriginal peoples' with a 'separate identity' that must be 'fully respected' – have for all intents and purposes, disappeared. In their place are a group of people, whose legitimacy as an indigenous people is based on their Indian ancestors' practices.

To make sense of this, we need to look again at the Court of Appeal decision. A dozen or so paragraphs prior to their discussion of indigeneity, Justice Sharpe makes a comment at once obvious and, insofar as it was directed specifically towards the Métis, deeply revealing. In following the reasoning laid out by Supreme Court Chief Justice Antonio Lamar in the *Van der Peet* decision, Justice Sharpe feels the need to remind us that the framework for interpreting First Nations rights will not necessarily be the same as that utilized for the Métis, because the Métis are a group "whose origins, history and culture is both indigenous and European" (Court of Appeal, 2001: para. 94). Similarly, following this discussion he goes on to say that the Métis "are peoples with bicultural origins. No culture, however distinctive, is free from the influences of those who came before. The distinctive Métis culture necessarily drew heavily upon the Aboriginal ancestors of the Métis" (para. 120). If by these quotes Justice Sharpe is referring to the obvious fact that cultures are transmitted inter-generationally, his statements are as banal as they are true. If, instead, Sharpe means that the distinctive Métis culture drew upon its 'Indian' or 'indigenous' roots, we have once again arrived at the line already drawn firmly in the sand by the Ontario Crown.

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[94] It is unlikely primarily because section 35 rights are site specific – as such, the courts would examine *local* First Nations practices.

On the one hand, the Appeal Court's observation is accurate – the Métis are, as explained earlier, the result of intermixing between First Nations (in this case, Ojibway) women and European fur traders in the deep interior of what is now central Canada. Therefore, insofar as Métis culture is a mix of indigenous and European traits, it drew on both cultures. But on the other hand, so are, and so did, local Ojibway communities. That is to say, those contemporary communities whose ancestors were involved in the fur trade are equally a group whose history and culture is both indigenous and European. This fact is integral to understanding the formation of Métis identities, and for comprehending how the fur trade was sustained and expanded, how First Nations communities participated in it, and how cultural change was engendered (see Ray, 1996; 1974). If this is the case, however, the only element separating Métis from Ojibway culture in the Sault Ste. Marie area is the issue of origins. Métis are not truly or fully indigenous because their distinctive culture is not traceable to the pre-contact era.

Theme #3: Dating Métis Aboriginality

On the face it, the Court of Appeal for Ontario chose not to deal with the appropriate time for determining the indigeneity of Métis culture, since both parties agreed to 1850 as the appropriate date. To wit, "[a]s the parties agree on the date, in the present case nothing turns on this difference, if any, between the assertion of sovereignty[95] and effective control" (Court of Appeal, 2001: para. 96). Thus, it makes little difference when, precisely, the courts pinpoint an appropriate date for considering Métis indigeneity (a date which, incidentally, changes based on the geographical area in question). True, they need to allow the formation of a historic Métis community, but there is ample evidence that whether they chose 1850, 1825 or even 1800 as the date, the Métis would have met the criteria as a distinctive Aboriginal community. The exact date is relatively unimportant because the Métis are not able to seek protection for practices which make them distinctively Métis but rather, only those which "correspond in broad outline with those of Canada's other Aboriginal peoples". Thus, despite the fact that the Sault Ste. Marie Métis were involved heavily in the commercial fishing industry, they would be hard pressed to justify this *Métis* practice as distinctively *Aboriginal* unless their Ojibway neighbours also engaged in this practice. Even if they *could* prove a similarly commercial activity among their Ojibway neighbours, the Canadian courts have ruled against commercially based activities on several occasions (the most notorious of these rulings being the *Van der Peet* decision). Despite the homage paid by and sympathy shown towards the Powleys by the Court of Appeal, and despite their inclusion as a people in s.35(2) of the *Constitution Act*, 1982, Métis are still firmly planted in the judicial imagination as 'part Aboriginal'. A Métis is still only half an Indian.

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[95] The Court of Appeal for Ontario mistakenly uses the date of the 'assertion of sovereignty' rather than the more relevant date of 'effective sovereignty'. Assertion of sovereignty is a concept most recently discussed in *Delgamuukw v. B.C.* (1997) and applies to title-based Aboriginal rights claims. Effective sovereignty and effective control are legal constructions linked to non-title based claims. Interestingly, the Ontario Crown and the Attorney General of Canada raise the issue of assertion of sovereignty at the Supreme Court of Canada.

Conclusion

In a way, and perhaps ironically, the Court of Appeal's decision itself serves as a fitting conclusion. Three models of Aboriginality were presented – moribund, passive and aggressive – and despite legal actors' multiple legal positions, the sociological issues nonetheless boil down to these three models. Either indigeneity is allowed to change, or it is not. Ultimately, it becomes a rhetorical question once we realize that *what* constitutes change is at least as important as – and in fact is crucial to determining – *whether* change has occurred. In the Canadian courts, change is measured not incrementally but on an either / or basis. If the practices are pre-contact, they are authentic. If they are post-contact (as distinctively Métis practices must be) they are not – or at least, they are not if they cannot demonstrate a pre-contact link.

There is an additional issue here that needs to be touched upon. The extent to which the tangled social and cultural histories which comprise the formation of fur trade communities in the Upper Great Lakes regions are difficult to unsnarl is dealt with more fully in the following chapter. Suffice it to say for now, however, that the Court of Appeal for Ontario appears to have had little difficulty in untangling these historical snarls, beyond cautioning that Métis issues are complex. A judicial ontology cannot sustain tangled categories, so clarity is imposed where none exists, and new realities are constructed to fit legal fictions. This is a shortcoming of using a litigation strategy. Mercurial mixed blooded identities are trapped in time and molded into staunchly Métis categories, then juxtaposed with 'Ojibway' identities as though the two could be so easily separated. In the realm of the judicial field, though, most things are possible, as long as we remember that judicial decisions are not 'reality'. However, it is not so easy to discern the real from the fictional and the courts have a way of imposing their own fictions on other people's realities. In this context, this has the effect of 'freezing' indigeneity in time. In chapter six this issue is taken up more fully in the context of thirteen new intervener arguments.

CHAPTER SIX

MÉTIS AS FULLY ABORIGINAL: SECTION 35 AND MÉTIS AT THE SUPREME COURT OF CANADA

INTRODUCTION

The previous chapter examined issues relating to indigenous difference-as-authenticity with respect to the Métis. Specifically, we examined this difference in the context of prior occupation and its relationship to determinations of legitimacy. The Court of Appeal for Ontario ultimately decided Métis were not 'fully' Aboriginal. Instead, determining the authenticity of Métis cultural practices required comparison with adjacent First Nations communities. In the present chapter, we examine similar sets of issues using courts materials from the Supreme Court of Canada level of *R. v. Powley*. Necessarily, there is some overlap between this and the previous chapter. Given that at all the interveners who submitted factums to the Court of Appeal for Ontario also made submissions to the Supreme Court of Canada, this is to be expected. However, the addition of thirteen new interveners, as well as several exchanges between Supreme Court of Canada justices and interveners during the oral testimony, provides a set of new issues and justifications which revolve around issues of cultural difference[96].

This chapter explores three sets of issues related to Métis Aboriginality. The first once again explores legal discourses pertaining to the *purpose* of section 35 Aboriginal rights. Recall from chapter two that precedent plays a powerful role in shaping the parameters of Aboriginal rights. Likewise, recall from chapter three that judicial discretion is shaped by stereotypes about what it means to be Aboriginal; these stereotypes favour constructions of Aboriginal communities and individuals as possessing a deep and abiding relationship to 'the land'. In this context, legal actors engaged in a wide range of discussion around what Aboriginal rights are for and how they apply to the Métis. These can be divided into three categories[97].

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[96] The reader will note a difference in the rhetorical styles I used to analyze the Court of Ontario appeal and the Supreme Court of Canada. While the testimony played a larger role in the former, it was virtually absent from the factums of the latter and as such, played only a minor role in the presentation of the analysis.

Theme #1 – the Purpose[98] of Including Métis in section 35 of the *Constitution Act*

> Position #1 – Derivative: the purpose of section 35 is to reconcile pre-existing Aboriginal occupation with Crown sovereignty. Métis are not pre-existing, therefore the purpose of including Métis in section 35 is to direct attention to other parts of the *Constitution* for which section 35 rights will be helpful (held by the Ontario provincial Crown; Attorney General of Canada; Attorney General of British Columbia; Attorney General of New Brunswick; British Columbia Fisheries Survival Coalition).
>
> Position #2 – Fully Aboriginal: Métis are part of a complex and dynamic post-contact Aboriginal landscape. The purpose of section 35 is to reconcile Métis occupation of territory with Crown sovereignty from the time when their (government's) legal obligations arose (Powleys' legal team; Aboriginal Legal

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[97] Bear in mind that various interveners hold 'fall back positions' through a rhetorical device referred to as 'in the alternative'. For example, the Ontario Crown begins with the primary position that pre-contact is the appropriate lens for deciding the Aboriginality of Aboriginal cultural practice. If the Court decides against that logic, they (the Ontario Crown) suggest that, in the alternative, pre-assertion of sovereignty constitutes the proper date. In some cases, the secondary arguments of interveners on opposing sides of the legal question are strikingly similar.

[98] In chapter five I split the themes between a discussion of the purpose of including Métis in section 35 and how legal actors positioned them as Aboriginal. In this chapter, these two are collapsed together, for two reasons. First, the arguments for why Métis are included in section 35 largely reproduce the logic of those contained in the Appeal Court for Ontario court files. More importantly, though, the new interveners spend a lot of time describing *what* makes Métis Aboriginal and thus assume that their inclusion naturally follows this construction.

Services of Toronto; Congress of Aboriginal Peoples; Labrador Métis Nation; Métis Nation of Ontario/Métis National Council).

Position #3 – Fully Aboriginal outside the Métis Nation Homeland: Like First Nations peoples, Métis are comprised of a number of different yet distinct communities. Thus, the court needs to look further than the boundaries of the historical Métis homeland when making decisions about how Métis are Aboriginal (Intervener for the Congress of Aboriginal Peoples; Intervener for the Labrador Métis Nation).

Position #4 – Discriminated Against Aboriginal Community: *R. v. Van der Peet*, if applied literally, would simply perpetuate past discrimination faced by Métis communities. The purpose of section 35 is to assist in ameliorating the discrimination faced by Métis people in the past (Congress of Aboriginal Peoples; Ontario Métis Aboriginal Association).

The second set of issues focuses on the relationship between authenticity/difference and prior occupation, and again focuses on determining the appropriate time frame for gauging constitutional protection. Interveners in *Powley* presented four possible dates for determining the authenticity of Métis cultural practices.

Theme #2: Dating Métis Aboriginality

Position #1: *Pre-contact*: Interveners taking a *pre-contact* stance took a hard line on the existing court jurisprudence about cultural difference, suggesting that since Métis communities did not exist prior to contact, any practices they receive protection for must show a pre-contact existence. In this stance, pre-contact communities and cultural practices are 'real' and correspondingly, any communities or practices lacking pre-contact origins are not (Ontario Crown; Attorney General of British Columbia; Attorney General of Canada; Attorney General of Manitoba; British Columbia Fisheries Survival Coalition).

Position #2: *Pre-assertion of Sovereignty*: The Ontario Crown and its allies justified the second stance by using legal arguments which basically argued that assertions by the sovereign was more than enough in instances where boundaries were not in dispute. Various interveners counted this view by arguing that contemporary power relations between the Canadian state and indigenous communities differ radically from those characterizing early relationships, such that mere assertions of sovereignty had little if any impact on the historical day to day realities of 'being Aboriginal' (Ontario Crown; Attorney General of Alberta; Attorney General of Canada).

> Position #3: *Pre-effective Control*: The third stance (eventually held up in the final Supreme Court of Canada decision) is *pre-effective control*. Using the point just prior to the effective control of Euro-Canadian government institutions, although still anchored in the notion that historical elements of Métis culture count as 'real' and deserving of protection, hinges on an entirely different model of Aboriginality. Here, the litigants argued that Métis – and hence, their practices – are Aboriginal not because they are invested with pre-contact First Nations cultural practices but because the Métis are themselves 'fully' Aboriginal. They self identified as Aboriginal and lived a lifestyle similar (though not identical) to those of other Aboriginal communities (Powleys' Legal Team; Aboriginal Legal Services of Toronto; Congress of Aboriginal Peoples; Labrador Métis Nation).
>
> Position #4: *Present Day Canada*: The Congress of Aboriginal Peoples presented the final and most radical stance. They argued that, just like non-indigenous practices, Métis practices have changed over time. Thus, as opposed to preserving Métis communities in their 'ancient form' the courts throw out the *Van der Peet* test entirely and fashion a new one which takes into account the evolution of Métis communities since the imposition of non-indigenous governing institutions. This factum's logic strikes at the heart of the court's entire construction of Aboriginality and perhaps not surprisingly, the Supreme Court of Canada avoided all of the issues it raised (Congress of Aboriginal Peoples).

Legal actors debated the meaning of prior occupation as a marker of cultural authenticity: the further back the date, the more 'pure' the Aboriginality of the communities / practices. In addition to occupation, they also debated the appropriate relationship between *blood quantum* and community membership / entitlement. This issue stemmed from the fact that, according to court records, Steve and Roddy *Powley* are 1/64th and 1/128th Aboriginal, respectively. Actors offered two basic positions on the issue.

Theme #3: Blood and Belonging

> Position #1: Aboriginal rights are race based. No one whose family had married out so successively (and thus, held such a low blood quantum) could be legitimately considered 'rights-bearing' Métis. In this instance, blood quantum was employed as a marker of identity legitimacy, such that regardless of how the Powleys self-identified or were communally accepted, their racial impurity rendered them morally undeserving as rights-bearing Métis. In this context, their

racial 'dilutedness' served to mark their cultural impurity (held by the Ontario provincial crown; Attorney General for Saskatchewan; Ontario Association of Anglers and Hunters).

Position #2: Aboriginal rights are politically based. Blood quantum should play no role in judicial decision making about community membership. Self identification and community acceptance constitute the only appropriate criteria for determining membership (Powleys' legal team; Aboriginal Legal Services of Toronto).

THEME #1: THE PURPOSE OF SECTION 35

Recall from chapter three that *R. v. Van der Peet* accorded section 35 Aboriginal rights a twofold purpose but in doing so, unwittingly created confusion regarding the meaning of 'pre-existence':

> the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the *pre-existence* of aboriginal societies with the sovereignty of the Crown (*R. v. Van der Peet*, 1996: para. 31 – emphasis added).

At issue in the *Powley* decision was how, exactly, to define the terms 'pre-occupation' and thus 'Aboriginal'. As expected given the somewhat adversarial character of common law, legal actors took oppositional opinions with respect to each term. I now elaborate on the four positions taken by the legal actors as presented at the beginning of the chapter, beginning with the position led by the Ontario Crown, namely, that Métis are mixed and therefore, whatever section 35 rights they possess must be rooted in pre-contact Aboriginal ancestral practices.

Position #1 – Metis are Derivative:

The Ontario provincial Crown position argued specifically that the purpose of section 35 was: "1) to recognize that distinctive aboriginal societies existed and occupied the land prior to the arrival of Europeans; and 2) to reconcile this prior occupation with the assertion of Crown sovereignty over Canadian territory" (Ontario Crown Factum, 2002: para. 15). Further, they argued that "Aboriginal rights cannot be asserted in the First Nations context where the practice is in response to contact with Europeans" (para. 16). Pre-occupation and Aboriginality are, for the Ontario Crown Factum, one and the same. Our discussion on the term 'Aboriginal' will show the conclusion of this coupling with respect to their understanding of whether, and if so how, the Métis are Aboriginal.

Crucial to sustaining position #1 is the conflation of several terms that, in a Canadian context, erase more than two centuries of Aboriginal use and occupancy. For example, in its factum the Attorney-General for Canada argues variously that section 35 is meant to protect the Aboriginal occupation of lands prior to the arrival of Europeans and that this prior occupation is important because it formed part of common law and British imperial policy "from the earliest days of European settlement" (Attorney General of Canada Factum, 2003: para. 13 & 14, respectively). Of course, the existence of Métis communities demonstrates an important difference between 'the occupation of lands prior to the arrival of Europeans' and 'the earliest days of European settlement'. Moreover, the strength of this claim relies on a particular reading of 'arriving' and 'settling'. I discuss this further below in position #2.

One intervener argued that even if one were willing to admit to the existence of Métis communities with their (necessarily) long standing use and occupancy patterns in defined territories prior to the assertion of sovereignty, Métis rights still could not be given life in section 35 because this use and occupancy had not been in place for centuries prior to this assertion: "Even using the time of establishment of British sovereignty, the Métis people had not been occupying the land for centuries and to a lesser extent, from time immemorial" (Attorney General of British Columbia Factum, 2003: para. 9). Such an understanding of the purpose of section 35 presupposes a particular understanding of the meaning of 'Aboriginal' and it bears some elaboration.

The meaning of 'Aboriginal'

Not all the interveners who chose position #1 took the time to articulate a definition of 'Aboriginal'. This is unsurprising in that often interveners will adopt positions taken by either the Powleys' legal team or the Ontario Crown (i.e. 'we agree with the position of the Ontario Crown as set out in para. 31-37 of their factum'). The Supreme Court of Canada level of the *Powley* case differs from the Court of Appeal for Ontario in that all interveners at the latter weighed in on the side of the Powleys, while none intervened on the side of the Ontario provincial Crown. Conversely, at the Supreme Court level all of the provincial (and federal) Attorneys-General intervened on the side of the Ontario Crown. This intervention increased the number and complexity of the discourses the Supreme Court of Canada justices could use in rendering their decision. In this context, most (but not all) the Ontario Crown's allied interveners' discourses focused on defining Aboriginality as a pre-contact phenomenon and on arguing therefore that Métis were a derivative of this more legitimate category. Significant to this argument is their use of the term 'First Nation' or 'Indian' to mean 'Aboriginal'.

Four interveners – the Attorney General for Alberta, the Attorney General for British Columbia, the Attorney General for New Brunswick and the B.C. Fisheries Survival Coalition – constructed a definition of 'Aboriginal' which accorded with what they referred to as a 'plain reading'. Ironically, evidence of this plain reading was secured using various dictionary definitions. For example, the Attorney General for British

Columbia argues that the "word "Aboriginal" (Autochtone) or its synonym aborigine (aborigène) does not, at least in its traditional meaning, answer the question as to why Métis should be considered an Aboriginal people of Canada" (Attorney General of British Columbia Factum, 2003: para. 15). Similarly, this intervener suggests that "one may step outside the Constitution for assistance in gleaning a meaning behind the term "aboriginal" that will aid in defining those rights potentially held by Métis people pursuant to s.35" (2003: para. 26). The Attorney General of British Columbia cites no less than three separate dictionary definitions[99] which affirm what they suggest is the common sense presumption that pre-existence "or being in an area first" is crucial to defining what it means to be Aboriginal. They conclude that "[b]oth the definitions of "aboriginal" and the case law…supports the contention that the purpose of s.35 is recognition and affirmation of aboriginal rights founded in the practices of the pre-contact indigenous population of Canada" (2003: para. 28).

The B.C. Fisheries Survival Coalition argues that both "the literal and plain meanings and the common usage would tend to exclude the Métis which, by definition, result from a union of "aboriginal" and "European" persons" (B.C. Fisheries Survival Coalition Factum, 2003: para. 13). The problem, they argue, is that the constitutional framers erred in including the Métis in section 35(2) of the *Constitution Act*, 1982. This error leaves three ways of articulating Métis Aboriginality. First, we may conclude that the inclusion of Métis in the *Constitution Act, 1982* doesn't require that they must possess Aboriginal rights. Second, we may use the part of the *Van der Peet* test that applies to

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[99] The Attorney General for New Brunswick cites five different dictionaries in both English *and* French (Attorney General of New Brunswick Factum, 2003: para. 15-17).

Métis[100] and argue that any rights they possess accrue by virtue of their Indian ancestry. The B.C. Fishery Survival Coalition suggests that this alternative "frankly acknowledge[s] that the inclusion of the Métis is by way of extended definition and creates a term of art or legal definition which is not only different from but inconsistent with both the literal and plain meanings and the common usage of the term "aboriginal"" (B.C. Fisheries Survival Coalition Factum, 2003: para. 17 – underline in original). The irony of this statement is all the more stark given the extent to which 'juridical speak' regularly appropriates 'common' words to use them in a specifically juridical context.

The third (and to the B.C. Fisheries Survival Coalition, most odious) alternative uses the lower courts' definition which treats the Métis as distinctly Aboriginal people. This approach, they tell us, conflicts with the purpose of the *Van der Peet* test, which is to find the "aboriginal" in "aboriginal rights". They go on to suggest that the consequence of this flawed reasoning creates a situation in which the courts search

> not for "aboriginality", but for a Métis culture which is not only distinctive but distinct. This in turn becomes a search for an appropriate date by which such a culture has crystallized so that a "snapshot" of it can be taken. Since, by definition, such a date must be after European contact, the search becomes one for an appropriate modification to the *Vanderpeet* test. But, because the *Vanderpeet* test is, itself, a search for the "aboriginal" in aboriginal rights, the search for a modification becomes in effect a redefinition of the term "aboriginal" (B.C. Fisheries Survival Coalition Factum, 2003: para. 21 – underlined in original).

The Coalition's intervention is typical of the rhetorical strategies used by all the interveners who attempted to discredit the Powleys' legal arguments about the possible legal meaning of the term 'Aboriginal'. They create a rhetorical Archimedean definition for a term (such as, for example, 'prior occupancy' or 'Aboriginal'), position it as a 'plain' or 'common sense' definition as though it existed outside the cultural boundaries of social construction, then use it as the definition against which alternative (and, given the context of the court case, equally legitimate) definitions are contrasted.

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[100] We can assume they are referring to paragraph 67 of the *Van der Peet* decision, since it is the only paragraph (at least, in the majority part they are discussing) to explicitly mention Métis.

According to this construction of Aboriginality the Métis are Aboriginal (are *only* Aboriginal) by virtue of their Indian ancestry. However, the Attorney General for Alberta presents a dictionary definition to demonstrate the distinctive differences between the juridical and non-juridical context of the word's usage. This definition defines Aboriginal as "First, or earliest known; ...indigenous. *Spec.* Earlier than (European) colonists" (Attorney General of Alberta Factum, 2002: para. 18 – underline added). Thus, while the Attorney General for Alberta writes that "[i]t is clear from this definition and from the common understanding of the word, that the only basis upon which the Métis people can claim to be an Aboriginal people is as a result of their Indian ancestry" (2002: para. 18), their own definition locates Aboriginality prior to colonialism. As in the Court of Appeal for Ontario, 'Aboriginal' as a legal category is compared to and ultimately, *conflated* with First Nations. That is to say, despite the placement of Métis in section 35 of the *Constitution Act, 1982*, interveners taking position #1 attempt to narrow its meaning to correspond only to that of First Nations[101].

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[101] The Attorney General for Canada is a notable exception, for obvious reasons. Rights which stem from a First Nation source increase the possibility that the federal government might be forced to assume financial and/or fiduciary responsibility for them. This intervener thus argues that Aboriginal rights are ultimately group rights, such that the mixed ancestry of an individual cannot be used as a source for those rights:

> While the Attorney General of Ontario specifically denies [their] theory is "derivative", the Attorney General of Canada submits that defining or limiting an aboriginal right in reference to the practices, customs, and traditions of aboriginal

This notion of the fundamental 'mixedness' of Métis is carried out most extensively by the Ontario provincial Crown in its factum to the Supreme Court of Canada. The Ontario Crown orients its discussion of Métis inclusion in section 35 of the Constitution first by reducing the Métis to mere 'mixed ancestry people', then arguing that "[p]ersons of mixed ancestry are not recognized to have aboriginal rights as a distinct group in Australia or the United States" (Ontario Crown Factum, 2003: para. 26). Having framed the Métis thus, they argue that up until the *Manitoba Act* of 1870 Métis were legislated not as a distinct class of people but as Indian by virtue of their Indian ancestry. "The legal rights of persons of mixed-ancestry have turned on whether they qualify to be a member of a tribe, share in the benefits flowing through a tribe, or are "Indians" as defined by legislation" (Ontario Crown Factum, 2003: para. 27).

If the court were to choose a date for the consideration of Métis rights other than the point of contact, the Ontario Crown argues that it should enshrine the common law that "protects the interests of historic communities of mixed Aboriginal and European origin that came into being prior to the assertion of Crown sovereignty because of their strong ties to the original indigenous inhabitants" (Ontario Crown Factum, 2003: para. 36; also see para. 55). They choose the assertion of sovereignty (rather than full blown colonialism) because, they suggest, Aboriginal societies were 'indelibly transformed' in the time period between the assertion of sovereignty and colonial control. Clearly, the Ontario Crown (like most of the interveners) clings desperately to a construction of legitimate Aboriginality as existing prior to European colonialism. This is, as discussed in chapter one, part of the *purity condition* (Martinot, 2003) central to the racialization of

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ancestor at contact is derivative and should be rejected as such (Attorney General of Canada Factum, 2003: para. 51 – fn. 50; also see Attorney General of historical Canadian society. The B.C. Fisheries Survival Coalition factum presents perhaps the construction of a purity condition vis-à-vis the Métis most starkly, arguing that:

> To say that the Métis acquire their aboriginal rights by way of inheritance from their aboriginal ancestors is no more remarkable or diminishing than to say they acquired other, equally important, rights (and traditions) by way of inheritance from their European ancestors. To say either does not deny that the Métis society is distinctive or unique; it is simply to say that that distinctiveness and uniqueness results in rights rooted in the traditions of two cultures rather than rights which are unique in themselves (B.C. Fisheries Survival Coalition Factum, 2003: para. 31).

Advocates of position #1 attempt to explain how the courts can interpret section 35 in a broad, liberal and generous manner without according any 'new' rights to Métis communities. Why, then, were Métis included in the *Constitution Act, 1982* if not to receive constitutional protection for their cultural practices? The Ontario Crown argues that section 35 rights may prove to be valuable 'directory' rights: they direct constitutional protections emanating from s.35(2) to other parts of the *Constitution* such as land claim agreements (s.35(3)), as well as s.25 rights[102] and s.37 rights (the post-Constitutional First Ministers conferences where the Métis secured themselves a place at the consultations) (Ontario Crown Factum, 2002: para. 32). In other words, this power to

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Saskatchewan Factum, 2002: para. 23).

[102] s. 25 reads: "The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

> *(a)* any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
>
> (*b*) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

provide rights recognized in other parts of the *Constitution Act,* 1982 constitutes the purpose of including Métis in section 35.

> The fact that the Métis are included in s.35(2) of the Constitution Act, 1982 as one of Canada's Aboriginal peoples does not and should not lead to the conclusion that they necessarily possess aboriginal rights protected by s.35(1). The inclusion of the Métis in s.35(2) is meaningful and serves a variety of purposes unrelated to whether the Métis have existing aboriginal rights finding protection in s.35(1) (Attorney General of Canada Factum, 2002: para. 4).

Position #2 – Métis are Fully Aboriginal:

In their factum, the Powleys' lawyers suggest that while the *Van der Peet* test sets out the parameters with respect to Aboriginal rights for First Nations communities, the *Powley* court is faced with the task of determining Métis Aboriginal rights[103]. In constructing its argument, the Powleys' legal team uses reasoning contained in Supreme Court Justice Beverley McLachlin's dissenting opinion in *Van der Peet* (see chapter three for a discussion of this dissent). The important part is her argument that "according to the text of the Constitution of Canada, it must be possible for aboriginal rights to arise after British sovereignty, so that Métis people can benefit from the constitutional protection of s.35(1)" (*R. v. Van der Peet*, 1996: para. 169). In their factum, the Powleys' legal team argues that one of the things that makes Canada (and section 35 of the *Constitution Act,* 1982) unique is "the designation of a people who arose after the date of contact with Europeans, as one of the "aboriginal peoples of Canada"" (Powley Factum, 2003: para. 14).

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[103] Jean Teillet, the Powleys' Métis lawyer, is a powerful speaker. In her opening argument before the Supreme Court, she stated "…we come here relying on a promise of this Court that was made in *Van der Peet*. We take it as a promise that *Van der Peet* would not be used against us to stop us from claiming the protection of section 35" (*R. v. Powley*, Supreme Court of Canada Oral Argument, March 17th, 2003: 62).

Unlike their Ontario Court of Appeal Factum (Powley Factum, 2000), the Powleys' legal team spends a good part of its Supreme Court factum attaching the purpose of section 35 to an underlying fiduciary obligation held (at the moment when) the Crown historically asserted sovereignty and was, more importantly, able to interfere significantly with the Métis land-based way of life (Powley Factum, 2003: para. 41). That is to say, the Powleys' legal team expends considerable space detailing the equitable principles through which the British Crown dealt with other Aboriginal groups historically, given their lawful obligations under the *Royal Proclamation of 1763* (Powley Factum, 2003: para. 43). As I explain later, the date of these obligations (determined on a case by case basis based on when the Crown effectively controlled the area) is important to the Powleys' lawyers' reasoning because the effective occupation trips the Crown's legal obligations. Moreover, it represents the appropriate lens through which contemporary governments deal with the Métis. "What is new about s.35 is a solid commitment to deal with the Métis as an Aboriginal people from now on. The government's failure to consistently treat the Métis as a people was one of Canada's "old and difficult grievances" that required reconciliation with the Métis" (Powley Factum, 2003: para. 67 – underline in original).

One is immediately struck by the differences between the Powleys' legal team and Ontario Crown's factum. The Ontario Crown (and their allies) provided us with a 'still life' portrait (see Rotman, 1997) of Aboriginal requiring little historical research into the lived experiences and changing landscape of the Upper Great Lake Aboriginal communities during the seventeenth and eighteenth centuries. Instead, proponents of position #1 deductively construct a black and white definition of 'Aboriginal' and then attempt to reconcile it with the realities of Métis origins. Conversely, the Powley Factum paints a picture of a complex and dynamic Aboriginal landscape in post-contact 'Canada', including the changes in inter-marriage, shared territories, trading relations, diseases and environmental impacts. Importantly, the Powleys' legal team argues that "the Aboriginal landscape has never been monolithic or geographically static. Some Aboriginal peoples have located, new Aboriginal peoples have arisen and some have disappeared" (Powley Factum, 2002: para. 21). Métis are one of the new Aboriginal people (para. 23).

The issue being grappled with is, of course, the meaning of 'contact'. Interpreting contact as the moment of first contact (as most proponents of position #1 have done) is problematic because it "creates a perverse game of tag that presumes Europeans had some divine right and metaphysical ability to freeze new societies when they first encountered them" (North Slave Métis Alliance Factum, 2003: para. 11) and dismisses the "lengthy period of time during which the two groups exchanged ideas and understandings, modified one another's behaviour and forged a partnership that enabled the creation of Canada" (para. 11).

The Powleys' legal team argues that Métis are Aboriginal not because they find their origins in pre-contact use and occupancy but rather, because the pre- and post-contact divide completely misses the dynamic complexity and evolution of indigenous communities in the early years of the 'idea and understanding exchange'. This construction of Aboriginality is strongly at odds with that proposed by proponents of position #1, which allows for little change, dynamism or complexity. Conversely, the Powleys' legal team argues that Métis are Aboriginal because their historical lifestyles were similar to – though distinctive from – those of other indigenous people. That is to say, Métis followed what the Powleys' lawyers refer to as 'the Aboriginal model' and suggest that Métis are Aboriginal for two reasons: 1) they evolved into a distinctively Aboriginal culture; and 2) they saw themselves (and others saw and treated them) as Aboriginal (Powley Factum, 2003: para. 31). I will briefly expand on these two arguments.

1) Métis Culture is Aboriginal

The Powleys' legal team suggests three characteristics that demonstrate the 'Aboriginality' of historical Métis communities. First, they were a very mobile rather than agrarian society with an economy which consisted of hunting, fishing gathering and trading. Second, their society was characterized not by political centralization but rather, by extensive kinship patterns stretching from Montréal, Québec to Red River (now Winnipeg, MB). Third, theirs was an oral culture based on "story, song, language and their life on the land" (Powley Factum, 2003: para. 34). Most importantly, however, Métis culture "grew out of shared group experiences and characteristics and in response to the Upper Great Lakes environment, where it evolved from 1640 to at least 1815 *without settler influences* – a period of some 175 years" (Powley Factum, para. 36 – emphasis added). In short, their culture was firmly established prior to the period of colonization which marked the middle part of the nineteenth century.

2) Upper Great Lakes communities Self-identified as 'Aboriginal'

'Aboriginal', as included in section 35 of the *Constitution Act*, includes three groups – Métis, Indians and Inuit peoples. Thus, it is rare that any groups today, let alone historically, would self identify as 'Aboriginal'. However, the Powleys' legal team artfully avoided the issue of whether the Great Lakes communities which they refer to as Métis today would have referred to themselves historically as Métis. In fact, the Respondents state that historical Métis were variously known as "half-breeds…freemen, Canadian, voyageur, chicot, michif, or bois brûlé" (Powley Factum, 2003: para. 22)[104]. In constructing the Métis as Aboriginal, the Powleys' lawyers point out that these communities differed from both Ojibway and non-Aboriginal settler communities. More importantly, *none* of the interveners raised the issue of historical self-identification in any of their factums nor did the Ontario Crown push the issue at trial (see chapter five for a discussion of this issue).

Thus, from the Powleys' lawyers' perspective the purpose of section 35 was to reconcile the pre-existence of Métis communities with the sovereignty of the Crown. This "gives legal force to Aboriginal peoples' traditional relationships to their homeland" (Powley Factum, 2003: para. 41) when "the Crown's obligations arose in various areas of Canada…when non-Aboriginal third parties began to conduct activities which interfered with land-related aspects of the way of life of the Aboriginal peoples then in possession" (para. 43). This issue is addressed further in our discussion of the relevant date at which Aboriginal rights have to be practiced.

Position #3 – Fully Aboriginal outside the Métis Nation Homeland

Although only a single intervener took this position it is significant because it requires the Court to make a decision about what the historical meaning of 'Métis' entails and who is eligible. The intervener for the Labrador Métis Nation argues clearly if controversially that "[n]ot all Métis communities are the same. ... There are variations throughout the country" (Labrador Métis Nation Factum, 2003: para. 4). The Labrador Métis Nation argues that any test set in place by the court must be mindful of this social fact and allow for variations in the expression of 'Métisness'. They argue that outside the confines of the Métis Nation homeland, for example, "[t]here are...Métis-Inuit in south and central Labrador, descendents of the Thule Inuit... the Labrador Métis Nation seeks to bring the unique perspective of this Métis-Inuit population of Labrador before this court" (2003: para. 6).

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[104] Likewise, the Labrador Métis Nation suggests that historically, mixed blood Inuit were known as Eskimos, Anglo-Eskimos, half-breed Eskimos, Inuit, Kablunagajuit, Settlers or Labradorians. "All of these names were and are a continuing assertion of and recognition of their Aboriginality" (Labrador Métis Nation Factum, 2003: para. 14).

For the Labrador Métis Nation, 'Métis' refers simply to intermixing, in this case between Thule Inuit and various European whalers, Moravian trader-missionaries and "occasional European males [who] trickled into Labrador from fishing stations, trading posts. etc." (Labrador Métis Nation Factum, 2003: para. 13). These mixed Inuit continued to live as a part of the Inuit communities (i.e. they did not formulate separate and distinctive communities). In fact it was not until the 1970s and 80s that they began to use the term 'Métis' to "signify their ineligibility for membership in the Labrador Inuit Association and the Innu Nation, the two other major Aboriginal organizations of Labrador" (2003: para. 15). Thus, the Inuit Métis are not separate and apart from Inuit culture but rather a specific segment of that culture who strategically use the constitutional descriptor of 'Métis'.

Position #4 – Discriminated Against Aboriginal Community

Modifying specific tenets of the *Van der Peet* test based on a differing construction of Aboriginality was not the only way interveners went about attempting to sway the Court. Two in particular (the Congress of Aboriginal Peoples and the Ontario Métis Aboriginal Association) focused specifically on the injustices visited upon Métis communities both past and present by the Canadian government. In this context these interveners attempted to play on the paternalistic sympathies of the justices involved in *R. v. Powley* to suggest that a strict *Van der Peet* test applied to the Métis would simply heap additional insult and injury on an already long suffering group of people. This sense of injustice was explicitly articulated by O'Neill, the author of the Superior Court of Ontario decision, who wrote:

> Surely, at the heart of s. 35(1), lies a recognition that aboriginal rights are a matter of fundamental justice protecting the survival of aboriginal people, as a people, on their lands. The Métis have aboriginal rights, as people, based on their prior use and occupation as a people. *It is a matter of fairness and fundamental justice* that the aboriginal rights of the Métis which flow from this prior use and occupation, be recognized and affirmed by s. 35(1) of the Constitution Act, 1982 (*R. v. Powley*, 2000: para. 16 – emphasis added).

The Ontario Métis Aboriginal Association relied heavily on examples from the Royal Commission on Aboriginal Peoples to provide examples of the systemic discrimination visited upon Métis peoples. In particular, using information contained in RCAP, they suggest that

> many Métis communities suffer pre-existing disadvantage, stereotyping and vulnerability as disadvantages that include: i) a vulnerability to cultural assimilation; ii) a compromised ability to protect their relationship with traditional homeland; iii) a lack of access to culturally-specific health, education and social service programs; and iv) a chronic pattern of being ignored by both federal and provincial governments" (Ontario Métis Aboriginal Association Factum, 2002: para. 9).

In their more sophisticated factum, the Congress of Aboriginal People made considerable use of international law around the issue of what they refer to as 'Aboriginal persistence'. Though only briefly referred to, an important issue they raise is that the

General Recommendations XXIII Concerning the Rights of Minorities (1994), "requires states "to ensure the continued development of the cultural, religious and social identity" of indigenous peoples by positive legal measures." (Congress of Aboriginal Peoples Factum, 2002: para. 13). Likewise, they draw attention to the *Declaration on the Rights of Persons Belonging to the National or Ethnic, Religious and Linguistic Minorities* (Article 4(2)) which declares that "States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs" (Congress of Aboriginal Peoples Factum, 2002: para. 14).

To this they add a general principle of international law that indigenous people hold the right to self determination and hold it against the federal government's own Federal Policy Guide which recognizes an inherent Aboriginal right to self government (para. 15). Although important, what is more noteworthy is the fact that Congress of Aboriginal Peoples argues that "[o]nly communities of sufficient critical mass, communities having the size and characteristics of nationhood, can self govern and determine culture. Local municipal communities are not capable" (Congress of Aboriginal Peoples Factum, 2002: para. 20). As discussed later in the chapter, this flies in the face of the analytical framework employed in *Van der Peet* which focuses on site-specific communities.

Finally, Congress of Aboriginal Peoples argues that section 35(1) needs to be understood as marking a new path between the Crown and Aboriginal societies. If section 35 is supposed to usher in an era of justice between these two entities, it cannot be "interpreted in a manner that simply perpetuates historical injustices visited on

Aboriginal people in colonial times" (para. 22). In particular, these injustices have inhibited the ability of contemporary Aboriginal nations to maintain or build upon 'national characteristics'. Thus, section 35(1) should be of benefit in the rebuilding of Ontario Métis nationhood, rather than frustrating it (para. 24).

Summary of the first theme:

Four different images of Métis-as-Aboriginal are presented with respect to discourses around the purpose of section 35. Position one paints the Métis as 'mixed'. They are derivative of deeper and more legitimate legal categories, namely First Nations (in this case, Ojibway). In addition to a philological investigation of the term 'Aboriginal' (i.e. their dictionary discussion), the Ontario Crown and allies construct a conception of Aboriginality which is based firmly in a model of authenticity-as-purity. Real Aboriginality, that which makes it fundamentally different, is not only anchored but may only be found in pre-contact use and occupancy. Practices which arise in response to European influences are not nor can they ever be truly Aboriginal. As such, unless they can demonstrate a link between their practices and those of their pre-contact First Nations ancestors, Métis practices are unworthy of constitutional protection. Similarly, their inclusion of section 35 needs to be understood as a means by which Métis can access other parts of the *Constitution Act, 1982*.

Position two is based on the premise that Aboriginality is far more complex and dynamic than case law (prior to the Supreme Court's *Powley* decision) permits. Thus, Métis are Aboriginal not because of their inclusion in an acontextual dictionary definition but rather because their culture in the Upper Great Lakes region exhibited features consistent with accepted understandings for what made indigenous people indigenous.

Low social and high geographical mobility; pre-dominantly oral transmission of culture; a mixed economy based on efficient land use; an indigenous language; and because, the Powley legal team suggests, they self identified as Aboriginal. Thus Métis are a distinctive group of Aboriginal people whose origins, although they do not pre-date European contact (whatever we might take that to mean), do predate colonialism.

Position three positions Métis to indicate certain Inuit individuals who, although part of the Inuit culture of Labrador have, been denied membership into Inuit organizations because of their 'mixedness'. Thus, Métis-Inuit has come to describe a strategic constitutional stance on the part of a sub-group of Inuit who possess no historically separate community formation or recognition. The fourth and final position differs somewhat from the first three in that it focuses specifically on the discrimination suffered by Métis at the hands of the various levels of Canadian government and contains little discussion of what makes Métis communities Aboriginal, other than that they faced discrimination similar to that faced by First Nations. Position four focuses more specifically on the discrimination faced by historical Métis communities (a discrimination which persists today) and in particular, emphasizes the potential ameliorative function of section 35 for contemporary Métis communities, both in the interests of not allowing this discrimination to continue but more importantly, as a means for allowing Aboriginal persistence.

The second theme is closely related to the first. In chapter three I discussed the part of the *Van der Peet* test which focused on the relevant date for assessing cultural practices seeking constitutional protection under section 35. At paragraph 44, the *Van der Peet* court stated that:

> the test for identifying the aboriginal rights recognized and affirmed by s. 35(1) must be directed at identifying the crucial elements of those pre-existing distinctive societies. It must, in other words, aim at identifying the practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans.

From a non-legal textual reading, two possible meanings can be derived from this sentence: either the test is directed at identifying the elements of pre-existing distinctive societies, or its aim is to identify the practices, traditions and customs central to aboriginal societies prior to contact with the Europeans. In the First Nations context within which the *Van der Peet* decision was decided, it is clear that the two meanings were equated. In the following section, however, we will discuss some of the sociological imagery anchoring discussions of the appropriate time frame for the 'Aboriginality' of Aboriginal practices. This imagery clusters along four dates: 1) pre-contact; 2) pre-assertion of sovereignty; 3) pre-effective control and 4) today. While most interveners adopted one (or more) of these positions, not all offered a justification: in fact, most simply reverted to the appropriate paragraphs in the *Van der Peet* decision. Several other interveners, however, provided tantalizing hints as to the appropriateness of their logic. We turn to theme #2 now.

THEME #2: DATING METIS ABORIGINALITY

Date #1: *Pre-Contact*

The logic anchoring the first date is closely tied to the argument about the purpose of section 35 and thus, what counts as truly Aboriginal. This section is somewhat briefer than those that follow. To wit: "[t]he purposive approach set out in *Van der Peet* does not provide for the recognition of Métis aboriginal rights because it is predicated on the existence of an aboriginal community at the point of contact with Europeans" (Ontario Crown Factum, 2002: para. 23). Pre-contact is considered to be the most relevant date because, the Attorney General for Canada argues, it most aptly encapsulates the core of what section 35 is supposed to protect – it is what makes Aboriginal groups Aboriginal. "While the requirement of "contact" is to be applied flexibly to avoid a frozen rights approach, it is designed to capture the essence of "aboriginality" which is the object of the s.35 protection…" (Attorney General of Canada Factum, 2002: para. 24). The Attorney General of Canada goes on to state that the purpose of section 35 is to exclude from consideration for protection any practices which arose solely out of European influences[105]. The pre-contact criterion represents the appropriate benchmark because it apparently excludes these post-contact influences (2002: para. 68)[106]. The Attorney General for Manitoba's factum echoes this logic, arguing that "in order for the practices of Métis communities, as with other aboriginal peoples, to be found to be *truly aboriginal*, they must be rooted in practices that developed prior to the arrival of Europeans" (Attorney General of Manitoba Factum, 2002: para. 26).

Another way of saying this is to express it as the BC Fisheries Survival Coalition did, suggesting that "[t]he existence of special constitutional protection for some Canadians must be justified" (B.C. Fisheries Survival Coalition Factum, 2002: para. 7). In short, what makes Aboriginal people different enough from non-Aboriginal Canadians that they deserve special constitutional protection? Such protections may only be justified by centering the analysis of what makes Aboriginal people Aboriginal. What is interesting about the Coalition's factum is that although it suggests pre-contact as the appropriate date (it buttresses the Coalition's definition of Aboriginality), it also suggests that

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[105] Incidentally, this presents a rather passive conception of historical Aboriginal societies. On the face of it, it is not possible to possess customs that arise solely out of European influences – it is always a result of the intermingling of the indigenous with the European or Euro-Canadian culture.

[106] See also Attorney General of British Columbia Factum, 2002: para. 12 and 13.

> the critical concept was that of "ancestral" rights rooted in traditions passed down from generation to generation… Focus on the concept of "ancestral" rights which are rooted in tradition and are "inherited" provides the key to an analysis which includes the Métis in the groups of Canadians with special constitutional protection but which maintains the basic integrity of Vanderpeet and its justification for special protection (B.C. Fisheries Survival Coalition, 2002: para. 12).

The problem for the Coalition, as pointed out earlier, is the extended definition of "aboriginal" to include Métis in the "ancestral" and "inherited" traditions under consideration by the Supreme Court of Canada. Problematic, because (they argue) the analytic logic underlying *Van der Peet* is predicated on a search for the elements of a culture which pre-exists and is separate from non-indigenous settler culture. The Coalition argues that neither the assertion of sovereignty nor effective control are relevant to the investigation of culture suggested in *Van der Peet* (B.C. Fisheries Survival Coalition, 2002: para. 23). Such a position presupposes a very frail construction of Aboriginality, that somehow mere contact immediately engenders a revolution in the ability of Aboriginal communities to govern themselves. The absurdity of this position is most starkly phrased in the argument of the intervener for the Labrador Métis Nation and is reproduced here in its full length.

> The notion that a magic moment of "first contact" between Europeans and Aboriginal people could have the effect of freezing immediately the rights of the Aboriginal people is a peculiarly Euro-centric one. It is a concept which emanates from a time in history when Europeans thought of themselves as the pinnacle of human society, with a divine right to claim the lands of other people. Centuries ago, Europeans thought that on the day that one of them first pulled into

> shore from their vessel and announced that they were claiming lands for their country, that something legal had happened. Some change in "sovereignty" was believed to have occurred (Labrador Métis Nation Factum, 2002: para. 47)
>
> Seen through the eyes and culture of the Aboriginal people, this notion of "first contact" would have been quite astounding. To the Aboriginal people, all that had happened was that a foreigner stopped in for a visit and then left. How would any Aboriginal culture think that some *de jure* event had just occurred? Nothing changed in the lives of the Aboriginal people, who continued to live within and evolve their internal customs, culture, laws and traditions. These encounters did nothing to give the European nation the ability to control the Aboriginal society (2002: 48).

Date #2: the Assertion of Sovereignty

The second date is discussed in the greatest depth by the Ontario Crown as part of their fallback, 'in the alternative' position. They take the approach that section 35 is not to protect Aboriginal difference. Rather, it allows for a small amount of change in Aboriginality, to the point just prior to the assertion of sovereignty by a colonial power, an argument following the logic of Supreme Court Justice McLachlin's dissent in *Van der Peet* (*R. v. Van der Peet*, 1996: para. 263-4). Thus, the Ontario Crown's fallback position is that

> …aboriginal rights exist because when the Crown first asserted sovereignty over a territory there frequently existed within it indigenous societies possessing their own legal and customary orders. These societies' prior legal and customary orders were presumed to be continued under the new colonial legal regime (Ontario Crown Factum, 2000: para. 35).

Yet, the Ontario Crown still equates Aboriginality with First Nations – likewise, their construction of Métis as 'part indigenous' and 'part European' leaves them in the odd position of affirming protection not for Métis Aboriginality but for the Aboriginality of the Métis (Ontario Crown Factum, 2002: para. 36). In short, they affirm protection for those specific elements among the Métis which comprise *part* of what it means to be Aboriginal but will not agree to the notion that Métis are themselves Aboriginal.

Thus, the assertion of sovereignty through "prerogative acts such as the annexation by Letters Patent" (Ontario Crown Factum, 2002: para. 37); the drawing of political / international boundaries (para. 45), especially in the context of treaty making (para. 47) are conclusive of the Crown's sovereignty in a particular area. A date often used for the assertion of sovereignty in large parts of Canada is 1670, the date at which King Charles II provided the Hudson's Bay Company Charter, which allowed trading and governance over all the waters that drain into Hudson's Bay (Attorney General of Alberta Factum, 2002: para. 22), an area of some 2.9 million square kilometers (Tough, 1996). Given the firm boundaries prescribed in the Hudson's Bay Company Charter, the Ontario Crown argues that no need exists to look to "the situation on the ground" in order to establish the legitimacy of sovereignty assertion (Ontario Crown Factum, 2002: para. 44).

The problem with choosing the date of assertion of sovereignty, of course, is that it assumes "Europeans…had the right to divide the rest of the world up between themselves, even if it was already occupied by someone else. European nations often asserted sovereignty over wide geographical areas, often times conflicting with each other" (Labrador Métis Nation Factum, 2002: para. 54). The intervener for the Labrador Métis Nation goes on to quote from Brian Slattery (a noted Aboriginal rights scholar) who argues that the mere assertion of sovereignty means little because "[c]laims advanced in one era were quietly retracted or modified in another. What was convenient to assert in dealings with European powers was often prudent to deny in negotiations with Indian groups, and vice versa" (Slattery, 1983 in Labrador Métis Nation Factum, 2002:

para. 54[107]). In short, the mere assertion of sovereignty had no impact upon the lives of Aboriginal communities (Aboriginal Legal Services of Toronto Factum, 2003: para. 26). This is elaborated in my discussion of the third date, where interveners focus on the point in time at which the Aboriginal right to govern was usurped by the imposition of colonial imperatives.

Date #3: Effective Sovereignty

The major differences in the interveners' arguments were based on differing conceptions of Aboriginality. The split between the two comes down to this: pre-contact versus pre-colonial. For example, earlier I mentioned that the Powleys' legal team's argument was that Métis culture had been in place for some 175 years prior to the imposition of a colonial regime. As I indicated earlier, the Powleys' legal team argues that Aboriginal rights stem from "the time when the Crown came under a lawful obligation to implement the equitable principles articulated in the *Royal Proclamation of 1763*" (para. 43). That is to say, their articulation of the *Van der Peet* test is based on a different construction of prior occupation, defined as the point at which "non-Aboriginal third parties began to conduct activities that interfered with the land-related aspects of the way of life of the Aboriginal peoples then in possession" (para. 43). Thus, Aboriginality is defined as a land-oriented lifestyle: "Section 35 provides the constitutional framework through which…distinct Métis people lived on the land…" (Aboriginal Legal Services of Toronto Factum, 2003: para. 3).

The idea that *Métis* Aboriginal rights are rooted in legal obligations stemming from Crown colonial activities is a novel one and in fact, one intervener (the Attorney

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[107] See also Jaenan's (1975) discussion of the imperial French practice of 'dual sovereignty'.

General of Canada Factum, 2002: para. 56-7) dismissed the entire line of argument based on its lack of precedent. However, the Powleys' legal team's broader point in setting this test is to place the Métis on equal footing with Canada's other section 35 Aboriginal peoples. That is to say, although various interveners (i.e. the Ontario Crown, the Attorney General of British Columbia and the Attorney General of Canada) attempted to argue that moving the test up from pre-contact would create an imbalance vis-à-vis the relationship of other Aboriginal peoples, the Powleys' legal team points out that in fact, the pre-colonial test is exactly the same test that most First Nations communities in Canada follow and thus is *not* unfair (para. 102).

> For the Indians, their rights are articulated in the treaties. They will not have to meet a contact standard should they litigate their rights...Contrary to the assertions of the Appellant, we say that not only is there no unfairness for the Indians, it would be manifestly unfair to hold the Métis to any test that is earlier in time than the treaties" (para. 102).

Interveners favouring pre-colonial versus pre-contact or (especially) pre-assertion presented a much different understanding of Aboriginality, similar to that already discussed in the Powleys' legal team's construction of Métis as Aboriginal people. That is to say, Aboriginal societies remained largely undisturbed until the point at which "[the colonial power] decided to impose its will to change Aboriginal societies" (Congress of Aboriginal Peoples Factum, 2002: para. 35). Likewise, the position that effective control reflects the appropriate date is also moored in the idea that contemporary understandings of the historical power of asserting sovereignty mistakes the inequity in contemporary power relations between Aboriginal people and the state for those that held historically. Indeed, the same can be said for the power of European contact. In short, interveners critiquing the assertion of sovereignty as a benchmark for 'dating' Aboriginal rights argue that early colonial (as opposed to trading or exploration) contact had little tangible effect on the pre-existing legal regimes of the Aboriginal societies in question.

More importantly, the notion of assertion of sovereignty is often conflated with the full blown imposition of colonialism because in many cases, the chronological difference between the two was negligible (Labrador Métis Nation Factum, 2002: para. 50). In the context of the Métis, however, nearly two centuries separate the 'assertion of sovereignty' with 'sovereignty'. Thus, a reasonable approach to understanding a preference for the latter over the former (i.e. 'on the ground' sovereignty over its mere assertion) means, essentially, that the sovereign's word cannot be taken at face value. Instead, one's lens must focus on the impacts of colonialism on the Aboriginal culture in question, and section 35 must focus on "the laws and customs of the Aboriginal peoples at a time when they "lived largely unaffected by European laws and customs"" (Aboriginal Legal Services of Toronto Factum, 2003: para. 25).

Thus, section 35 Aboriginal rights are constructed in date three at the point where Aboriginal people lose the ability to "evolve naturally and organically". This construction bears a certain affinity to the definition of colonialism offered by Georges Erasmus (discussed in chapter one): "Traditionally, we acted; today, we are acted upon" (Erasmus, 1978: 177). Aboriginality can thus be pinpointed at the time at which Aboriginal communities became acted upon through the various projects of colonial origin and imposition and were unable to counteract those colonial projects. An important issue arising from this is, of course, what counts as 'full blown colonialism'? Recall in chapter one that I argued colonialism is the substantive meaning of effective control. In return, effective control is based on the ability of an imperial power to successfully implement: a military presence; civil and criminal courts; governmental services (education, postal, medical, etc.); and local government; the presence of governmental officials and offices (see Labrador Métis Nation Factum, 2002: para. 61). Other aspects might include: the right of eminent domain (i.e. the right to take private land for public use), the ability to conscript local citizens, the ability to tax and the formulation of new geographical 'place naming' (i.e. "we were no longer naming, we were being named").

Date #4: Present Day Canada

Following closely the sensibilities expressed by Supreme Court Justice L'Heureux-Dubé in her dissent in *Van der Peet*, only the proponent of date four does not consider the use of history important for defining section 35 Aboriginal rights. Relying little on Aboriginal rights precedent and heavily on legal principles derived from broader discourses from Canadian constitutional law and international covenants, the intervener for the Congress of Aboriginal peoples focuses on Aboriginal *persistence* rather than *difference*. Persistence rather than difference constitutes the proper lens because, he suggests, the courts are an improper place to be deciding on issues which should be decided by Aboriginal people themselves. Quoting the 1998 Supreme Court of Canada *Re: Succession of Québec* case, the intervener for Congress of Aboriginal Peoples argues that the right to self-determination includes internal self-determination, which is a "people's pursuit of its political, economic, social and cultural development within the framework of an existing state" (*Re: Succession of Québec*, 1998: para. 114 in Congress of Aboriginal Peoples Factum, 2002: para. 18).

This inherent right to self-determination is tied strongly into the federal government of Canada's own rhetorical statement on the issue:

> The Government of Canada recognizes the inherent right of self-government as an existing aboriginal right under section 35 of the Constitution Act, 1982. ... Recognition of the inherent right is based on the view that the Aboriginal peoples of Canada have the right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources. The Government acknowledges that the inherent right of self-government may be enforceable through the courts (Federal Policy Guide: Aboriginal Self Government, 1995 in Congress of Aboriginal Peoples Factum, 2002: para. 19).

Presumably, the right to self-government would include the right to hunt and fish if so permitted by the governing body, especially if those practices are thought "critical to its cultural development" (2000: para. 21). Thus, the Congress of Aboriginal Peoples suggests a re-tooled *Van der Peet* test which contains four basic principles. "Aboriginal rights are the significant customs, traditions or practices of Aboriginal societies

1. which have not been extinguished by colonial powers;
2. are currently practised and have been practised for a reasonably continuous period;
3. do not have a major impact on non Aboriginal people or fundamental interests of the provincial and federal governments; and
4. include those customs, traditions or practices which evolved after assertion of sovereignty that are necessary for the maintenance or evolution of Aboriginal societies" (Congress of Aboriginal Peoples Factum, 2002: para. 53).

Where the Congress of Aboriginal Peoples' test differs from those of the Ontario Crown and even the Powleys' legal team's is its argument that Aboriginal rights are not and have never been based on a particular 'moment of crystalization'. Prior to the assertion of sovereignty by Europeans or even prior to their securing of effective sovereignty, Aboriginal peoples lived in traditional land-based societies. These societies were organized through pre-existing legal regimes (whether referred to as customs or laws, etc.) just as were those of the European power asserting sovereignty. The intervener for the Congress of Aboriginal Peoples argues that contact accorded Europeans no legal legitimacy over these pre-existing legal regimes; rather, legal legitimacy resulted on when Europeans held the power to *and did* alter them. The Congress of Aboriginal Peoples argues, in fact, that leaving these Aboriginal societies "largely undisturbed" constituted a major plank of early British colonial policy. Thus, the doctrine of Aboriginal rights "allowed for the evolution of Aboriginal societies and Aboriginal law except where a superior power expressly or by necessary implication countermanded it" (Congress of Aboriginal Peoples Factum, 2002: para. 38).

Although the Powleys' legal team has taken this to mean that Aboriginal rights crystallize at that moment of power, the intervener for the Congress of Aboriginal Peoples draws a different conclusion. This intervener argues that not only do none of the previous authorities require a date be set as a crystallizing moment but that there is nothing in the authorities "that necessarily forbids Aboriginal societies – after contact, settlement, or the assertion of sovereignty – from continuing to evolve their customs, traditions, practices, laws or legal systems" (Congress of Aboriginal Peoples Factum, 2002: para. 47-8). Such customs, traditions, practices, laws or legal systems must be allowed to evolve until such point as the sovereign power sees fit to extinguish them. Hence,

> [t]he *Van der Peet* test is objectionable because it requires a modern court to focus on ancient practices and speculate on how antiquity might evolve into modern forms. It ignores the actual development of Aboriginal societies. It freezes Aboriginal practices at the date of European contact and only protects modern

> forms of those practices – again ignoring as legal subjects the real, living Aboriginal societies. It does not protect practices which evolved after contact which are necessary for the maintenance of evolution of Aboriginal societies. This diverts attention away from the critical inquiry which should be: how did the Aboriginal society actually evolve and how did the superior power react to it? (Congress of Aboriginal Peoples Factum, 2002: para. 51).

'Appropriating Time': a summary of theme #2

The arguments presented by interveners regarding the appropriate time frame for deciding the validity of Aboriginal rights is located, perhaps appropriately, in the various logics set out in the *Van der Peet* decision. Those endorsing the Ontario Crown's view define Aboriginality in much the same way as that approved by the majority in *Van der Peet*. An authentic Aboriginal practice cannot owe its origins to the presence of European culture (although its evolution can benefit from this influence) – this logic is the starkest form of the *purity condition* explained in chapter one. The point of contact is presented as the date at which one can most reasonably be certain that a practice is 'purely' indigenous. This position does not make a whole lot of legal sense, since no legal obligations arise from mere contact (see Slattery, 2000).

Advocates of position two justify the appropriateness of the mere assertion of sovereignty through two possible contexts. First, they tacitly assume that the historical sovereign constituted an overpowering force whose very words impacted the lives and more importantly the legal regimes of indigenous societies. I pointed out that this stance assumes that the contemporary inequity in power relations between Aboriginal people and the Canadian state reflects those which obtained historically. That is to say, since the Canadian government constitutes an overwhelming force today, it must have historically as well. This position is belied by the bulk of the evidence on historical relations between indigenous societies and colonial administrators, which suggests relations of material (not cultural) equity at least until the early nineteenth century[108]. The second argument which may be inferred from this position is that interveners conflate the assertion of sovereignty with its imposition. In many cases this is appropriate; however, in the context of the Métis nearly two centuries separate one from the other. Moreover, although this position appears to take its logic from Supreme Court Justice McLachlin's dissent in *R. v. Van der Peet*, McLachlin's own logic switches back and forth between the assertion of sovereignty and effective sovereignty.

Thus, the third position also purports to find its roots at least partly in McLachlin's dissent. Here, colonialism constitutes the appropriate time frame (a frame which will differ by geographic location). Aboriginal rights are based on the Crown's obligations to Aboriginal people. Those legal obligations began the moment they superceded the Aboriginal society's ability to self-govern. This is an important step forward over the first two positions because it allows for the growth and evolution of Aboriginal practices deemed protected by section 35. In the case of the Métis, it may even one day allow for the protection of commercially based rights (since Métis in the Sault Ste. Marie, Ontario community were engaged in small scale commercial fishing before the advent of effective control by the British Crown in the 1850s). Yet, even in victory this position reinforces an image of Métis as living on and drawing sustenance from their lands. While this certainly describes one reality of being Métis, it marginalizes the more than two-thirds of Métis living in Canada's cities.

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[108] The date was earlier in eastern Canada and later in western Canada.

Finally, position four is based solidly in L'Heureux Dubé's dissent in *Van der Peet*. Since like all cultures Aboriginal cultures change over time it makes no sense to attempt to define exact practices which may be protected but rather, to look to the collectivity within which practices are embedded. Although the Congress of Aboriginal Peoples (the champion of this position) still agrees that these practices must comprise a significant part of the society / community in question, they should be allowed to evolve up until the time that an imperial sovereign extinguished them. If they were still in existence after 1982 they should receive constitutional protection regardless of their form or content.

THEME #3: BLOOD AND BELONGING

The final issue in my analysis of the *Powley* decision is the relationship between 'blood quantum' and community membership. The Powleys' genealogy is the juridical equivalent of the pink elephant in the room: everyone sees it but no one will talk about it. Two major and diametrically opposed positions presented themselves in the interveners' factums. These were:

> Position #1: Aboriginal rights are race-based. No one whose family had married out so successively (and thus, held such a low blood quantum) could be legitimately considered 'rights-bearing' Métis.
>
> Position #2: Aboriginal rights are politically based. Blood quantum should play no role in judicial decision making about community membership. Self identification and community acceptance constitute the only appropriate criteria for determining membership.

These discourses of legitimacy, although they circulate strongly in Native communities, are perhaps more firmly embedded in 'whitestream' society and nowhere are they more starkly presented than in the factums of those interveners who chose to make it a focus of their intervention. We turn to position #1.

Position #1: Aboriginal rights are at least partly biologically or racially based

In the introduction to its factum, the Ontario Crown makes a statement that is both brief and laden with underlying racialized meaning. After laying out the charges and briefly discussing the circumstances leading up to them, the Ontario Crown informs the Court that "[t]he Respondents Steve Powley is of 1/64th Ojibwa ancestry and his son…Roddy Powley, is of 1/128th Ojibwa ancestry" (Ontario Crown Factum, 2002: para. 3). With no other information, what are we to make of this? Rhetorically, its impact is immediate in that it requires the reader to infer all the racialized understandings of Aboriginality without the Ontario Crown actually having to state it. About a hundred paragraphs later, the Ontario Crown explains more explicitly what it means by relaying information stating that:

> [t]he Respondent Steven *Powley* has one Métis ancestor four generations back who was a member of the historic Métis community – a great-great grandparent of ¼ Ojibwa ancestry. His 15 other great-great grandparents were not Métis or otherwise aboriginal. His son Roddy *Powley* has one great-great-great grandparent who was a member of the historic Métis community and 31 ancestors of that generation who were not Métis. Since the early 1800s, every subsequent generation of the *Powleys* has married a non-Aboriginal person (Ontario Crown Factum, 2002: para. 112-13)[109].

From this, the Ontario Crown argues that allowing the Powleys a section 35 Aboriginal right to hunt will open the floodgates for a high percentage of the population to engage in similar practices. In turn this will hamper the ability of conservation officers (part of the Ontario provincial government) to effectively enforce their wildlife management regimes (2002: para. 110).

In arguing that the Appeal Court for Ontario erred finding a sufficient connection between the Powleys and a contemporary Métis community, they explicitly engage in a biological justification, quoting a previous Australian High Court decision: "there must be evidence that the claimant is both an indigenous person and a biological descendent of the indigenous clan or group who exercised traditional and customary rights…" (2002: para. 106). In a more domestic context the Ontario Crown suggests that the *Indian Act* used a 'two generation' rule such that anyone who married out for two generations became ineligible to receive status. Moreover, even Indian bands that developed their own rules required a more substantial link than that demonstrated by the Powleys. "In 1992, the 236 bands that had adopted their own membership codes under the *Indian Act* applied one of four principles of descent. They are: the one-parent rule (90 bands); the two-parent rule (67 bands); the rules set out in s.6 of the *Indian Act* (49 bands); and a blood quantum measure (30 bands)" (Ontario Crown Factum, 2002: para. 108).

The Ontario Crown's argument is a bit more sophisticated than simply suggesting that a low blood quantum negatively impacts conservation schemes, however. Instead, they argue that low blood quantum is evidence of a weak social and cultural attachment, such that the weaker the ancestral connection the weaker the community attachment. This is echoed by the Attorney General of Saskatchewan, who argues that "[t]he existence of such low levels of Indian blood indicate only an attenuated connection to the historic Métis community at Sault Ste. Marie. On this basis alone, it is submitted that the Respondents are not entitled to exercise the Aboriginal hunting rights of the contemporary community" (Attorney General of Saskatchewan Factum, 2002: para. 64).

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[109] Also see Ontario Federation of Anglers and Hunters Factum (2003: para. 3).

This intervener argues further that "[c]ontrary to the [Powley legal team's] submission, section 35(1) rights are race-based rights and there must be some objective basis on which to determine who possesses these rights" (2002: para. 70).

Position #2: Aboriginal Rights are Politically Based[110]

The Powleys' legal team's position is that Aboriginal rights are political rights in the sense that membership rules are the outcome of democratic community processes. As such, the test for determining whether someone is a section 35 rights-bearing Métis community member has two parts: 1) does the claimant self identify as Métis; and 2) is s/he accepted by a Métis community. Since the Powleys never took the stand in their own defense, their counsel relied on their application for membership to the Ontario Métis Aboriginal Association, the moose tag they affixed to the moose ear and their reapplication as members of the Métis Nation of Ontario when it began in 1994 (Powley Factum, 2002: para. 138). Likewise, the Powleys' counsel presented evidence of a genealogical connection which they noted was affirmed by the Crown's own expert witness. Ultimately, they argue that

> s. 35 embodies the fundamental principle that the Aboriginal peoples recognized and affirmed in the Constitution are polities – political and cultural entities – not racial groups. This fundamental principle also governs individual membership in such polities and rules with respect to who can exercise the polities' rights. It prevents the imposition of arbitrary standards on membership rules (Powley Factum, 2002: para 141).

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[110] Interestingly, despite the Powleys' legal team's reliance on a political ontology rather than a symbolic of blood, when one of the Powley team's Métis witnesses was asked why he thought Métis were Aboriginal, replied "[b]ecause the blood in our veins is as long and deep as the blood in the veins of people who are recognized as Status Indians by the Government of Canada" (Trial Testimony, vol. 1: 57).

Thus, the Powleys' legal team completely rejects a blood quantum argument, suggesting that it has never been accepted in law or Canadian society as a means of determining membership. The intervener for the Aboriginal Legal Services of Toronto echoes this logic, suggesting that s. 35 recognizes "peoples", which are organic political and cultural entities as opposed to racial groups (Aboriginal Legal Services of Toronto Factum, 2003: para. 49). Blood quantum is disrespectful in this context given Canada's multi-racial and multicultural values and is an inappropriate test for determining membership (2003: para. 50).

To briefly review: Supreme Court of Canada in *Powley* ruled on a number of issues, three of which are of particular interest here. First, the purpose of section 35 and the results of this purposive reasoning; second, the relevant 'date of crystallization' for determining Métis Aboriginal rights; and third, the relationship between blood and community membership. One note before I delve into the Supreme Court of Canada's decision in *R. v. Powley*. The Supreme Court rarely comments on particular intervener factums. Rather, if we borrow again Foucault's notion of truth regimes as 'a limited system of presences' we can understand what logics courts agree (or disagree) with in part by the extent to which they are acknowledged in the decision. Before beginning my discussion of the Supreme Court decision itself, I will briefly review the range of discourses the Supreme Court justices had before them for analysis:

Issue #1: the purpose of section 35:

i) to reconcile pre-contact occupation with Crown sovereignty;
ii) to reconcile pre-colonial occupation in the Upper Great Lakes with Crown sovereignty;
iii) to assist in the amelioration of disadvantage suffered by Métis

iv) to reconcile pre-colonial occupation by Métis in all parts of Canada with Crown sovereignty;

Issue #2: relevant date of crystallization:

i) pre-contact;
ii) pre-assertion of sovereignty;
iii) pre-effective control;
iv) present-day Canada;

Issue #3: significance of blood quantum in community membership;

i) significant blood quantum a necessary element of eligibility for section 35 rights;
ii) discourses of blood quantum have no role to play in the construction of section 35 rights

THE FINAL WORD: THE SUPREME COURT OF CANADA DECISION

Theme #1: the purpose of section 35

As summarized in the intervener factums the Supreme Court of Canada had a number of options for ascribing a purpose to s. 35. In its decision the Supreme Court explicitly repudiated the Ontario Crown's (as well as all the Attorney Generals' with the exception of the Attorney General of Canada's) construction of Métis as 'part Aboriginal'. Specifically, the judges found that simple mixed ancestry did not qualify one to possess a section 35 Aboriginal right. Instead, "it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, way of life, and recognizable group identity separate from their Indian or Inuit and European forebears" (Supreme Court of Canada, 2003: para. 10). That is to say, the Supreme Court found that Métis were 'fully Aboriginal' and as such, there was no need to look to pre-contact practices or communities to determine their authenticity.

Finding that Métis are fully Aboriginal scuttles the basis of the logic articulated in the majority decision in *Van der Peet*, that section 35 protects pre-contact practices. The Supreme Court also makes it clear that Métis are not to be held to a strict application of the *Van der Peet* test. They argue instead that the *Van der Peet* majority originally considered the possibility that their test might not capture the distinctiveness of the Métis and as such, might require modification in the context of Métis rights. At the time, the Supreme Court of Canada had suggested that Métis rights might be derivative of their First Nations ancestors (following along the lines suggested in the Ontario Crown).

Additionally, the Supreme Court recognized in the specific facts of the case that the ancestral community to which the Powleys belong is a Métis community, but they made no finding as to whether or not this community is part of a larger Métis Nation (thus dismissing the Métis National Council's intervention). However, in finding that "[a] Métis community can be defined as a group of Métis with a distinctive collective identity, living together in the same geographic area and sharing a common way of life" (Supreme Court of Canada, 2003: para. 12) the Supreme Court suggests significantly that:

> given the vast territory of what is now Canada, we should not be surprised to find that different groups of Métis exhibit their own distinctive traits and traditions. This diversity among groups of Métis may enable us to speak of Métis 'peoples', a possibility left open by the language of s. 35(2), which speaks of the "Indian, Inuit and Métis peoples of Canada (2003: para. 11).

This finding is a direct (if vague) substantiation of the Labrador Métis Nation's intervention – the effect of their recognition will no doubt be decided in future court cases. At the very least, however, the wording of the Supreme Court decision leaves the door open for communities who self-identify as Métis yet live outside the 'Métis Nation

Homeland' boundaries (as explained by the Métis National Council) to attempt to secure section 35 rights for themselves as 'rights-bearing Métis'.

Thus, the Supreme Court found that

> [t]he inclusion of the Métis in s. 35 is based on a commitment to recognizing the Métis and enhancing their survival as distinctive communities. *The purpose and the promise of s. 35* is to protect practices *that were historically important features* of these distinctive communities and that persist in the present day as integral elements of their Métis culture" (Supreme Court of Canada, 2003: para. 13 – emphasis added).

The reader will note that while this paragraph contains certain elements of both the Congress of Aboriginal Peoples' factum (the enhancement of survival), it rejects others. That is to say, the purpose of section 35 is not to protect Aboriginal *persistence* (explored in the Congress of Aboriginal Peoples factum and in Supreme Court Justice L'Heureux-Dubé's dissent in *Van der Peet*) but rather those *historically* important features of their society. This is a major shortcoming of the episteme within which Aboriginal rights get constructed and I discuss this further in the conclusion of this chapter but it may be one worth endorsing given the larger symbolic victory secured through *R. v. Powley.*

Theme #2: Identifying the Relevant Time Frame

In finding that the Powleys are fully Métis and that Métis are 'fully Aboriginal', the Supreme Court argued that the purpose of Métis rights cannot be understood to protect only the pre-contact practices of their First Nations ancestors but rather, "[t]he constitutionally significant feature of the Métis is their special status as peoples that emerged between first contact and the effective imposition of European control" (Supreme Court of Canada, 2003: para. 17). This construction recognized the unique situation of the Métis and set into motion for the first time a post-contact basis for a non-title based Aboriginal right. This constitutes a tremendous change in the official juridical discourses and in fact countermands broader stereotypes about what makes Aboriginal people Aboriginal (although the court nevertheless continues to locate authentic Aboriginality historically rather than contemporarily). In taking this 'middle road' approach (McLaughin's words in her *Van der Peet* dissent) the Supreme Court dismisses both the Aboriginal-as-pre-contact but also the Aboriginal-as-contemporary arguments forwarded by the Ontario Crown and the Congress of Aboriginal Peoples, respectively.

The Supreme Court's construction expressly rejects the Ontario Crown's argument that only Métis practices derived from their First Nations ancestors would qualify for constitutional protection under s. 35, arguing that such a finding would deny Métis their full status as suggested by their inclusion in section 35. The fact that these practices were integrally Métis rather than practiced by both Ojibway and Métis was the important point. As long as the practice constituted a strong part of the community's identity prior to European effective control of the area, it satisfied the modified *Van der Peet* requirement (Supreme Court of Canada, 2003: para. 38). In this context, the court found a substantial and thriving Métis community in the Upper Great Lakes community until the imposition of colonialism in the 1850s.

Thus, the Supreme Court endorsed the Powleys' counsels' argument if not their logic. Recall that this argument was anchored in the idea that the imposition of colonialism constitutes the appropriate date because it is the date at which the colonial government begins its legal obligations to the communities in question. The Supreme Court of Canada evades a discussion on this issue; instead it simply nuances the issue by placing it in the narrower context of a modified *Van der Peet* test without raising the issue of whether a fiduciary relationship exists between the Canadian government and Métis claimants.

Theme #3: the basis of community membership

The 'strength' of the Powleys' ancestry, although engendering acrimonious debate among the interveners, played little role in the final decision. Although noting the possible difficulties in determining membership in a Métis community without the formal structures of, say, a status Indian band, the Supreme Court of Canada nevertheless found that Métis rights were fully as protected as those of communities with more standardized membership criteria. Therefore, they accepted the test suggested by the lower courts, containing three criteria: self-identification, ancestral connection and community acceptance (Supreme Court of Canada, 2003: para. 30). Regarding self-identification, the court found further that "[t]his self-identification should not be of recent vintage: While an individual's self-identification need not be static or monolithic, claims that are made belatedly in order to benefit from a s. 35 right will not satisfy the self-identification requirement" (Supreme Court of Canada, 2003: para. 30).

More importantly, the Supreme Court found that while the Métis claimant must possess a 'real' connection to the ancestral community through ancestry, a specific blood quantum could not be used as a basis for this connection. "We would not require a minimum "blood quantum", but we would require some proof that the claimant's ancestors belonged to the historic Métis community by birth, adoption, or other means" (Supreme Court of Canada, 2003 : para. 31). Practically speaking, it constitutes a generous test; at least until the Métis political organizations can derive their own membership codes. On the other hand, however, to what extent will the courts allow the "or other means" to extend? If Aboriginal rights are truly collective, it seems to me it should not matter *who* exercises the right, as long as they are members of the community. This would allow non-Native resource harvesters to exercise an Aboriginal right as community members of a rights-bearing Métis community. Rights either accrue to the collective, or they do not. Predictably (since it was outside the fact situation) the courts are silent on this point, for now.

CONCLUSION: 'FULLY ABORIGINAL'

In chapter one I surveyed two major discourses within which Métis get situated in authenticating their Aboriginality: the pre- and post-contact divide and blood quantum as a measure of legitimate belonging. The interveners' factums addressed these issues along a whole gambit of more specific issues situated within these two more dominant discourses. In the end, the *Powley* decision was a huge win for the Métis; they were juridically ordained as 'fully Aboriginal' such that their mixedness both with respect to blood and origins was dismissed in favour of their full inclusion as Aboriginals in section 35 of the *Constitution Act*, 1982. However, the victory was not without its costs. In chapter three I elaborated how the Royal Commission on Aboriginal Peoples, a primary medium through which state-sponsored 'truths' are generated, constructed Aboriginality as 'historical' and 'land based'. I argued that the problem with this construction was not that it presented a reality of Aboriginality that does not exist but rather that it presents it as though it is the only one that does.

Thus, even in a decision widely considered a 'slam dunk', the Métis are represented as they lived more than a century ago. That is to say that the Supreme Court of Canada ultimately positioned Métis s. 35 rights to protect historically important practices rather than those important to a majority of Métis today. One reaction to this decision was aptly described by my sister, a single mother of three living in a city in southern Saskatchewan. In replying to one of my emails explaining my dissertation and how the Supreme Court of Canada *Powley* decision (indirectly) protected certain hunting and fishing rights, she said:

> What good is giving me a right to fish? To get to the lake I'd have to have a car, and fishing poles, and licenses...and then spend money I don't have on gas, that I could be using to buy the stupid fish in the first place (overpriced I might add) from my local store. Hell, who cares if I have rights to hunt and fish right now anyway. I have no place to go. Where *am* I going to go? To my nearest buffalo pound? It's not like going out to a forestry farm and picking out the best Christmas tree[111].

Aboriginal communities are and should have the right to be contemporary, to be *modern* – just like other communities. However, as presented in the *Powley* decisions, they are rarely understood in this light. Moreover, like the courts most Canadians tend to understand Aboriginal cultures singularly and as something of 'the past', deeply connected to the land – neither of which, presumably, is commensurate with living in the city (see RCAP, 1996, vol. 4: 519-528). As such, urban Aboriginals dwellers are often thought of as social problems and a threat to the well-being of the city, rather than partners worthy of collaboration. For example, Evelyn Peters (1996) notes a 1960 Saskatchewan government report stating that "the day is not far distant when the burgeoning Indian population, now largely confined to reserves, will explode into the white communities and present a serious problem indeed" (Peters, 1996: 122).

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[111] Originally, this conversation had nothing to do with my dissertation research, other than that we were simply discussing why I was **still** in university and what my 'book' was about. I asked and secured permission from her to use the passage.

Aboriginality is thus positioned as fundamentally incompatible with urban life. *Urban Aboriginals are a social problem in cities because they do not belong there.* Stereotypes about where Aboriginal people *really* belong have a profound effect on the ways that mainstream Canadian policy makers frame problems and the context within which they offer solutions, to the extent that this even occurs and, as we have seen, the ways in which the courts make normative judgments about what it means to be Aboriginal. The fact that urban Aboriginals are perceived as social problems might lead to the conclusion that the government would be more, rather than less, likely to enact policies to ameliorate the problem. However, the federal government has to a large extent ignored the urban Aboriginal population, due in large part to their interpretation of s.91(24)[112] of the *British North America Act of 1867* but also, as we see in the *Powley* decisions, because of the courts' interpretation of section 35 to include only contemporary communities who can demonstrate their connection to a pre-colonial community[113].

The extent to which the gap between court constructions of Aboriginality and that of a majority of Métis people today can be bridged by using the courts is anyone's guess. Certainly, the culture of incremental judicial decision-making makes it unlikely that

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[112] Section 91(24) gives the federal government constitutional jurisdiction over 'Indians and land reserved for Indians'. This clause has been interpreted by the federal government as giving them responsibility for 'Indians *on* land reserved for Indians'.

[113] The previous two paragraphs are taken from my previously published article: (forthcoming, 2005) "Residual tensions of empire: contemporary Métis communities and the Canadian judicial imagination", in Murphy, M. (ed.), *Reconfiguring Aboriginal-State Relations. Canada. The State of the Federation, 2003*, Montreal and Kingston, McGill-Queen's University Press. I have asked for and have received permission to reproduce it here.

Canadian courts will render any radical pronouncements on section 35 rights that will benefit urban Aboriginal communities. Moreover, the extent to which Métis court victories focusing on narrow factual parameters (i.e. 'the right to hunt for food in the Sault Ste. Marie, Ontario region) will lead to broader relations of equality between Métis communities and the provincial and federal government is unclear. What is clear, though, is that prior to the *Powley* decisions the Ontario provincial government repeatedly dismissed attempts by Métis political organizations to negotiate; post-Powley, the Ontario government has agreed to negotiate with the Métis political representatives of Ontario Métis residents. In the final substantive chapter I will explore this relationship between the Canadian courts and the broader Canadian bureaucratic field.

CHAPTER SEVEN

FROM THE JURIDICAL TO THE BUREAUCRATIC: THE POLITICAL AFERMATH OF *R. V. POWLEY*

> DAN LESSARD (Canadian Broadcasting Network – Sudbury North FM Reporter): What do you think [the Powleys'] victory is doing for Métis people?
>
> JEAN TELLIET (Powleys' lawyer): Oh I don't think we even really know what it's going to mean in the end. It's so new and its such a fundamental change in the law of this country, that I think we will be quite a long time sorting out what this case has done for the Métis people but at a bare minimum, what it has done is made governments across the country have to sit down and actually start working with recognizing and dealing with Métis people which they have been adamantly refusing to do before. They wouldn't even talk to Métis people. And now, that's what's happening. And I think one of the clearest results so far is we have a what we call a multi lateral discussion going on right now which is provincial representatives and federal representatives sitting down and talking about it, exactly this, what does this case mean and what are we going to do about it now. I think all governments recognize that they…fundamentally have to change their policies now. And so we have to figure out how to do that and what is the right thing to do. And some people have said some good things to us, like you know, well we haven't done very good with Indians so far, maybe we can get it right with the Métis. So we are hopeful[114].

INTRODUCTION

When deciding on a dissertation topic, I read the first *Powley* Ontario Court of Justice decision, delivered in 1998. The Powleys' legal team had (apparently) secured a huge victory for Métis, on several fronts. But as I read through the decision it was apparent that they had not really won very much in the sense that they secured a right to hunt for food in the Sault Ste. Marie, Ontario area. Big deal, I thought. This is a right which is, in many ways, peripheral to most Métis people living in Canada today; especially those of us living in urban areas. The discourses produced in the decision painted a picture of Métis as a community living close to the land for which hunting was and remained a central and significant part of their lives. Within the factual confines of the case this made sense because it focused on the community in and around Sault Ste. Marie. Nevertheless, at least initially, this seemed me to me be just another example of the courts' colonialism. Métis rights, like all section 35 rights, were interpreted as protecting contemporary practices that were required additionally to be of integral *historical* importance. That is to say, no positive, social rights: no hot lunches for inner city Métis children or the homeless; no broad based rights to education; no distinctive relationships regarding self-government land agreements.

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[114] http://www.Métisnation.org/news/04_MAR_StevePowley_Jean_Interview.html (April, 2004). In another interview, Teillet stated that "This case is really about hunting rights, but it is not a big stretch to imagine that if you have the right to hunt, you have the right to access other resources as well….It will force the government to rethink all of their policies" (Kingston Whig-Standard, Sept. 20, 2003).

As I read deeper into the sociology of law literature I found that the problem did not necessarily stem just from a conservative court (critical legal and critical race theory's perennial whipping post) but rather, from an incomplete discussion about not only court decisions but the materials used to produce them. Most critiques of 'Law' which focus on the courts analyze the actual court decision itself. As I made clear in chapter two and three, court decisions are the province of judges and although judges have the final word in (and through) court decisions, theirs' is not the only one. In the context of the *Powley* case, when the Supreme Court of Canada produced a historical construction of Métis, it did no more than the Métis litigants asked of it. In fact, the

Powley decision is about as lopsided[115] a victory in favour of Métis people – in the context of the factums they submitted to the court – as has ever been produced in (and by) the Supreme Court of Canada.

In fact, the Supreme Court of Canada expressly rejected the (most) conservative interpretations of precedent forwarded by the Attorney Generals for all the provinces, as it did the more radical ones presented by the Aboriginal interveners. This serves as an important reminder to those who would argue that precedent plays a far more powerful role in judicial decision-making than various intervener factums. As Bell & Asch (1997) remind us, what counts as relevant precedent and how it is positioned is always a matter of interpretation, but it is important to broaden the range of those interpretations through intervention (see Gotell, 2002), to open up the discursive parameters of the case. Thus, although all social movements take place on old ground (Hunt, 1993) such that the addition of radical discourses is unlikely to sway judicial opinion, one needs to start someplace. Moreover, intervener factums provide a portal into the broader policy strategies favoured by various legal actors who come before the courts; in this way, court files are always an (imperfect) distillation of larger political discourses.

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[115] In the context of being faithful to the *Van der Peet* decision's logic, the Supreme Court of Canada could easily have argued that although Métis communities are 'fully Aboriginal', in the sense that although they arise after contact they must not be accorded a subservient position to First Nations in a hierarchy of section 35 rights, their cultural practices must nonetheless demonstrate a pre-contact origin. This is the same test that applies to non-title, non-treaty First Nations practices and represents the logic endorsed by the Appeal Court for Ontario. Moreover, the judges might also have argued a cultural means test, arguing that although they accepted that the Powleys were Métis, they were exactly of the 'recent vintage' the Supreme Court argued against in its decision. In this sense, the decision was extraordinarily beneficial to Métis interests. As I and several other Métis I know joked, if the Powleys can past this test, *any* Métis back in our communities can.

So, where does that leave us? Are the lawyers for the Powleys trapped in the mystifying 'legal consciousness' so stridently and paternalistically decried by critical legal theorists? Perhaps they are (I discuss this below), but to assess the value of the *Powley* decision we need to look not only at the court case itself but its relationship to the broader political field and in Métis communities more generally. In the introduction to her excellent *Unleashing Rights: Law, Meaning, and the Animal Rights Movement*, Silverstein (1996: 4) argues that

> law is located not only in judicial and state institutions but in nonjudicial and nonstate realms. Although the official state institutions remain important to analyses of the legal system, it is by exploring the broader, unofficial realm of social interaction that we can develop a more subtle, complex, and expansive understanding of the law.

This chapter offers some observations for how juridical texts produced in 'official state institutions' socially interact with what Silverstein refers to as the 'unofficial (by which she means non-juridical) realm'. Having said that, however, I should also say that following in the footsteps of previous legal consciousness theorists (i.e. Sarat & Kearns, 1993; McCann & Silverstein, 1993; Gordon, 1984; Harrington and Yngvesson, 1990), Silverstein's point was actually somewhat more complex, and, given her broader base of available material and different objectives, more subtle than mine. That is to say, she was interested in exploring how animal rights activists made sense of (and produced) 'legal meaning' in both juridical and non-juridical spheres of action over a long period of engagement with various sources of 'law'.

The newness of *Powley* necessarily renders my objectives in the present research more modest. The basic thrust of this chapter is that Métis political organizations, unable to secure political victories through a direct engagement in the bureaucratic field, have turned to the courts to assist them in these endeavours and is divided into three parts. In part two I discuss the early successes and more recent failures of Métis political organizations in the bureaucratic field, the latter of which precipitated their entry in the juridical field as an element of their broader strategy. This second part also contains a brief discussion of scholarship drawn from the social movement literature in its positioning of the courts as an instrument for (in their view) progressive social change. Prior to this discussion, however, in part one I elaborate an element of Pierre Bourdieu's sociology – his understanding of *capital* – to better situate the power of litigation for Métis claimants. This provides a more nuanced context for understanding how and why the *Powley* decision is thought to be so important, despite the fact that it enshrines in its interpretation of the constitution a set of practices that most Métis will never use. Finally, the chapter ends with a brief discussion of the effects of the *Powley* decision on the relationship between Ontario provincial Métis organizations and the Ontario government's Ministry of Natural Resources.

PART I

The Rise and Fall of Métis Fortunes in the Canadian Bureaucratic Field

McCann (1998: 79) suggests that social movement literature generally attributes various stages to social movements which include: (1) the initial identity formation of the group, including consciousness raising and group organizing; (2) early attempts to gain the recognition of more powerful or dominant groups; (3) 'growing pains' which include struggles over securing a stable agenda and implementing these choices; and (4) the movement's eventual decline or transformation. The history of Métis political struggle in Ontario fits this model to a 'T', but more broadly so do other Canadian Métis political movements. This has particularly been the case from the early 1970s onward, which saw the advent of government funding to Aboriginal political organizations (see Sawchuk, 1998).

The social and political upheaval of the 1960s in Canada led to a broad questioning of what government and citizenship ought to entail (Boldt, 1993: 21-4; Weaver, 1981). Weaver argues that in Canada, this was precipitated by the 'active citizenship' encouraged by the Trudeau government, a substantial enlargement of earlier Prime Minister Pearson government policy (Weaver, 1981: 10). Moreover, public sympathy for 'the plight of Indians', took place in a larger political climate that was marked by the civil rights and anti-poverty movements gaining momentum in the United States, as well as by the emerging nationalism of developing countries who sought to break free of the chains of colonialism (Weaver, 1981: 15). Available research at the time indicated that the Métis still lived near or at the bottom of the scale for most quality of life indicators, in particular poor housing, poor diet, poor health and economic instability[116]. Weaver (1981) and Sawchuk (1998; 1995; 1980) argue that in Canada, this civil rights upheaval and the subsequent government assistance, led to the reinvigoration of Native political groups[117].

Weaver (1985) suggests that during the 1960s, although the public sympathy was present there was very little available knowledge about Native people that government agencies and ministers could use to make competent policy decisions (also see Weaver, 1981). Thus, prior to Trudeau's rise to power, only small grants were provided to Native organizations to hold meetings or conferences. Trudeau's mandate however, was a potent force in shaping the form and content of Native policy, particularly their formulation of the White Paper on Indian Policy in 1969, which sought to 'remove the racism' that special status engendered, allowing the full citizenship of Indians, by removing this status (see Boldt, 1993: 21-4; Nicholson, 1984; Schwartz, 1986: 18-27; Weaver, 1985: 81-2). In line with these larger policy objectives, in 1971 the federal government initiated CORE funding program through the Secretary of State, which provided grants for basic operating costs and overhead for provincial, territorial and national Native organizations (Ontario Métis Non-Status Indian Association, 1978: 5; Sawchuk, 1998: 72-3). Weaver (1985) argues that by the early 1970s a cottage industry had sprung up around Native program policies and monies, part of the sedimentation of a larger 1970s *social justice policy paradigm*. This paradigm

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[116] Buckley *et. al.*, 1963; Card *et. al.*, 1963; Manitoba Branch Canadian Association of Social Workers, 1949; Métis Association of Alberta, 1973; 1972; Saskatchewan Métis Society, 1970; Valentine, 1955; 1953.

[117] Sawchuk (1998; 1985; 1980; 1978) argues further that the form and regulation of this reinvigoration have been both a blessing and a curse for the struggle to break the bonds of dependency. The revival of Native political groups has been predicated primarily upon

> was characterized by priorities on social policies and was buttressed by economic prosperity in the country, an expanding bureaucratic establishment in Ottawa, a belief in enhanced policy formulation through rational-technocratic means, and a belief that social problems could be remedied by more government intervention in society. Most of the native programs were created in this expansive period (Weaver, 1985: 82).

This CORE government funding enacted entirely new native political organizations – in fact, the Ontario Métis and Non-Status Indian Association was a member of the Native Council of Canada, the main national body purporting to represent Métis and off-reserve Indians. This national organization was founded in 1970 and

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government funding, providing considerable power to shape the contours of Native gained formal recognition in 1971. The Native Council of Canada was in a sense an entirely inorganic organization – although it came out of a 1970 meeting between leaders of the provincial Métis organizations and the non-status Indian association in British Columbia to create a direct line to the federal government in Ottawa, it had a turbulent career (Gaffney *et. al.*, 1984: 20; Sawchuk, 1998: 36; 1995: 81). Its membership by-laws stated that it was "a federation of the provincial and territorial associations recognized as the organizations representing the interests of the Métis and Non-Status Indians of Canada" (in Métis Society of Saskatchewan, 1972: 30), which meant that it was forced to overcome, during its entire existence, the strong regional differences that characterized non-status politics during that era. In other words, it was an organization constructed by Native groups whose only commonality was that both groups (i.e. Métis and non-status Indians) were denied a direct relationship with the federal government (Sawchuk, 1998: 36; 1995: 81).

Gaffney *et. al.* (1984) argue that the Native Council of Canada's mandate was to ensure that the government of Canada recognized its responsibility to *all* Aboriginal people in Canada by virtue of s. 91(24) of the *British North America Act of 1867* (1984: 3). Indeed, the Native Council of Canada's Declaration of Rights suggests that it was interested in the integration of native Canadians into the Canadian political landscape 'as equal partners', sharing in the legislative process, as well as land and natural resource development, while retaining the rights to preserve their cultural heritage and Native languages (Gaffney *et. al.*, 1984: 112 – Appendix B). This larger concern for all

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political protest (also see Weaver, 1984: 65).

Aboriginals in Canada, versus the narrower nationally formed concerns of a particular constituency, eventually led to the break up of NCC in 1983.

Despite the strong regional differences which resulted in a vigorous tug of war between the Native Council of Canada's various constituent groups, its legacy includes a remarkable achievement: the enshrinement of Métis people in section 35(2) of the *Constitution Act of 1982* (RCAP, vol. 4: ch. 5). The constitution and its possible amendment became the dominant political issue for Aboriginal people in Canada in the late 1970s and early 1980s (Sanders, 1983); the NCC wrote several reports which explored the relationship between Native people and Canada (i.e. Daniels, 1981; 1979a; 1979b). As today however, Native political aspirations immediately prior to the repatriation of the *Constitution Act of 1982* stood in the footprints of Québec (Sanders, 1983: 302-3), such that they were not expected to play a significant role in the negotiations. Sanders details the political campaigns, both domestically and internationally, the various Indian organizations undertook as a means to embarrass Canada internationally – in so doing, they succeeded in becoming political actors in the constitutional talks, redefining the scope of Aboriginal rights (Sanders, 1983: 326-7). The Native Council of Canada had a slightly different agenda, which was to state, in the explicit wording of the *Constitution Act*, the names of the Aboriginal groups that the federal government had already agreed to include under the rubric 'Aboriginal'. Through numerous negotiations and brief coalitions with other Native organizations involved in constitutional talks, the Native Council of Canada was finally able to achieve this goal (Gaffney, *et. al.*, 1984: 1-15).

In 1983, the National Council of Canada was set to participate in the section 37 post-Constitution First Minister's Conferences (FMC); the purpose of these conferences was to hammer out the exact meaning of the treaty and Aboriginal rights which had already been granted in the *Constitution Act of 1982* (Sawchuk, 1998: 38). Three national Aboriginal organizations were guaranteed seats at the conferences: the Assembly of First Nations, representing status Indians; the Inuit Tapirisat, representing the Inuit of northern Canada; and the Native Council of Canada, representing all off-reserve Aboriginal people. However, the organization of NCC was such that off-reserve Indians were continually able to outvote western Métis, resulting in leaders that held Indian interests, rather than distinctly Métis ones (Sawchuk, 1998: 38). In 1982, the elected president and vice-president turned out to be non-status and status Indians (respectively), angering the western Métis, who understood that at least one of the two seats promised to the NCC at the First Ministers Conference would go to a 'western' Métis delegate.

Immediately, the leaders of the three provincial Métis organizations and the Federation of Métis Settlements met and immediately formed a new organization, the Métis National Council. The MNC, although initially refused a seat at the First Minister's Conferences, threatened to sue and were eventually granted a single seat, and as well were allowed the addition of an agenda item dealing with a land base and self government for the Métis (Gaffney *et. al.*, 1984: 36-38; Sawchuk, 1998: 38-9). Sawchuk suggests that the Native Council of Canada, riven with regional tensions, would probably have split apart long before 1983 except that the Secretary of State funding required the NCC mandate to include both Métis and non-Status Indians (Sawchuk, 1998: 38-9). Gaffney *et. al.* (1984) suggest something slightly more sinister, however. They argue that the national rights approach favoured by the western Métis played into the federal government's hands, allowing them to reduce the numbers of Métis they were responsible for to those living in the west. They argue further that the federal government broke its own guidelines by fostering 'breakaway' groups from the Native Council of Canada (1984: 19-20).

As of 1989, the Métis National Council engaged in talks with the federal government during the Charlottetown Accord to produce a test for determining Métis – this was to have been enshrined in the repatriation of the Constitution had it passed. Equally importantly, the Accord included a section which declared that Métis were to be considered Indians for the purposes of section 91(24) of the *British North America Act of 1867*. With the failure of the Accord, however, the Métis National Council changed its strategy, opting to move from an overtly political to a legal strategy to pursue the rights of its members. For example, the Métis Nation of Saskatchewan, a member of the Métis National Council, decided to file a statement of claim challenging the legitimacy of the scrip process alluded to earlier as a valid method for extinguishing Métis Aboriginal title[118]. Likewise, when the Powleys were charged with hunting without a license, the Métis Nation of Ontario undertook to support them both politically and financially.

For my purposes, the formation of Métis political organizations in Ontario during the mid-1990s in particular represents an important context for understanding the decision to carry the *Powley* case forward as part of a political strategy and to understand it the larger import (and again, context) of its victory. The latest iteration of Ontario

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[118] http://www.Métisnation-sask.com/rights/index.html April, 2004.

Métis political activity was formed in 1994 with the Métis Nation of Ontario, partly to divest itself of the Ontario Métis Aboriginal Association (OMAA). OMAA was formed in 1971 as the Ontario Métis and Non-Status Indian Association (OMNSIA) with a subsequent name change to OMAA in 1987. This did not constitute the first Native political organization in Ontario, however, Métis political activity in this region has been officially organized since 1968, when the Nipigon Métis Association was formed (Ontario Métis and Non-Status Indian Association, 1978: 5). OMNSIA, the only Métis political organization in Ontario until 1994, was originally formed to represent the interests of the estimated 100,000 Métis and non-status Indians residing in Ontario in the early 1970s, to "encourage and help Métis and non-status Indian people in Ontario to do as much as they can by themselves to resolve their housing, educational, employment and other social and economic problems in order to develop their communities" (Ontario Métis and Non-Status Indian Association, 1978: 9).

Finding information on the formation and dissolution of the Métis political organizations is notoriously difficult, not least because little academic literature exists on the issue but also because many of these organizations provided little in the way of organizational literature focusing on their formation. Thus, the rise of the Métis Nation of Ontario (MNO) is elaborated through a discussion of Métis Nation of Ontario president Tony Belcourt's testimony during the original trial. Belcourt was a founding member and the first president of the MNO, a position he continues to hold today; in addition, he was a founding member of the Ontario Métis and Non-Status Indian Association (which became the Ontario Métis Aboriginal Association in 1988).

Belcourt suggests that the formation of the Métis Nation of Ontario came as a result of a power struggle within the Ontario Métis Aboriginal Association between Métis and non-status Indians over whether to focus specifically on issues of interest to Métis, especially self-government (Trial Transcripts, vol. 1: 104). Off-reserve Indians (and perhaps some Métis; the trial transcript is unclear) felt threatened by the movement to form a specific Commission within OMAA to address issues of self-government for self-identifying Métis members.

> (Teillet) Q. Can you tell us why it was such a pitched battle?
>
> (Belcourt) A. Many people felt that...that the Ontario Metis and Aboriginal Association was their organization. They didn't want to see it be threatened in any way obviously.
>
> Q. Did they think it was a threat for the Metis to form...
>
> A. I think so.
>
> Q. ...a sub group within it?
>
> A. Yes. They were not comfortable with the notion we were putting forward that since they were Status Indians and they had an opportunity to be able to deal with their aspirations and self-government and knowing we couldn't through the Bands, we had absolutely no opportunity, even though that opportunity may have been small for most of them, there was absolutely none for the Métis through that avenue. We wanted to have our own avenue to look at and so they resisted that. They wanted to keep an umbrella association that was program oriented, to go after programs and services whereas we were thinking of something quite different.
>
> Q. That being...?
>
> A. That being the business of binding our people together for the purposes of participating with the rest of the Métis Nation in Canada and being recognized as a people in the Province of Ontario (Trial Transcripts, vol. 1: 104-5).

Belcourt stated that Métis within the Association felt alienated in that board meeting discussions were dominated by the concerns of Indians living off reserve, who were primarily interested in gaining band status for organization members. While he felt "[this] agenda is perfectly legitimate" for off-reserve Indians, he also felt "as a Métis person sitting around a table, what's that got to do with me?" (Trial Transcripts, vol. 1: 111). Moreover, the huge amount of debt the Ontario Métis Aboriginal Association had acquired (according to Belcourt it was costing more than $50,000 a month just to service) had led to the cancellation of various delivery programs they operated, in particular a profitable rural housing program. The association was audited, and given the option of declaring voluntary insolvency or being forced into bankruptcy.

> (Belcourt) A: The Board of Directors narrowly passed a resolution to wind up the organization on the basis of voluntary insolvency and to provide support to successor organizations which would independently emerge to represent the interests of the Métis in the Province and the First Nations off-Reserve in the Province (Trial Transcripts, vol. 1: 108-9)[119].

Soon after, the Métis Nation of Ontario became incorporated in the province of Ontario and the board members produced a 'statement of prime purpose': "We, the Métis Nation, are a distinct Nation among the Aboriginal peoples in Canada, and as such our Aboriginal and treaty rights are recognized and affirmed under Section 35 of the Constitution Act, 1982" (Statement of Prime Purpose, n.d.: 1). Among their aims and objectives, the Métis Nation of Ontario declared their wish "to ensure that Métis can exercise their Aboriginal and Treaty rights and freedoms and in so doing, act in cooperation with other Aboriginal and non-Aboriginal groups" (Statement of Prime Purpose, n.d.: 1). More specifically, MNO pledged to work to bring change to the depressed socio-economic circumstances of Ontario's Métis, to improve their job status, work to provide education funding and improve access to health care[120].

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[119] In one of the many vagaries of Canadian Aboriginal politics, the federal government had an election soon after the Métis split off from the Ontario Métis Aboriginal Association and with it, the former legal counsel to OMMA became the new Minister of Indian and Northern Affairs, such that the Ontario Métis Aboriginal Association managed to find funding to maintain itself (Belcourt, Trial Testimony, vol. 1: 114).

Part of their first order of business involved producing a definition of their citizenry. Their original definition included all people as members of the Métis Nation of Ontario who were of Aboriginal ancestry, self identified as Métis, were distinct from Indian or Inuit, had at least one grandparent who was Aboriginal and whose application was accepted by the Métis Nation of Ontario (Métis Nation of Ontario Secretariate By-Laws, n.d.: 1). Although amended several times, this definition remained in place until the recently constructed national definition, created in consultation with the other Métis National Council provincial organizations at the Métis National Council's 2003 Annual General Assembly to read "Métis means a person who identifies as Métis, is distinct from other Aboriginal peoples, is of historic Métis Nation ancestry, and is accepted by the Métis Nation" (Métis Nation of Ontario Secretariate By-Laws, n.d.: 1).

Of particular relevance is Belcourt's discussion about the refusal of the Ministry of Natural Resources for the province of Ontario (whose conservation officers laid charges against the Powleys) to negotiate a distinctive relationship with Métis Nation of Ontario citizens in the specific context of harvesting rights. According to Belcourt, this refusal stemmed from the Minister's argument that since the Métis Nation of Ontario did not represent all Métis in Ontario, they were unable to put in place a regulatory regime for subsistence moose hunting. In making this assertion, the Powleys' legal team asked Mr. Belcourt to read part of an official letter received from the (then) Minister of Natural resources Howard Hampton:

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[120] www.metisnation.org/insideMNO/home.html (April, 2004).

> [w]hile staff has briefed me on the progress that your organization has made in the past months, and on the work you have done with the Métis National Council, I am aware that there are Métis people in the Province who have chosen not to be represented by the Métis Nation of Ontario. It is difficult to develop an allocation for Métis harvest of large game while the issue of Métis representation in Ontario remains unresolved (letter from Minister Hampton to President Belcourt, Trial Transcripts, vol. 1: 98).

This reluctance is puzzling in a sense because, as Belcourt points out, the Métis Nation of Ontario was not asking to negotiate on behalf of all Métis people living in Ontario but rather, only those on its membership list, a process, he points out, the government of Ontario has already entered into with Status Indian organizations. That is to say, although numerous and different status Indian organizations represent different groups of status Indians who are part of their respective organizations, the fact that the Métis Nation of Ontario failed to represent *all* Métis was deemed fatal to a resource allocation regime.

Following the 1990 Supreme Court of Canada *Sparrow* decision, the Ontario government enacted an Interim Enforcement Policy to deal with the issues raised in *Sparrow* regarding the nature of section 35 Aboriginal rights vis-à-vis the duty to negotiate with Aboriginal communities when creating allocation regimes. Part of the policy stipulated that negotiated agreements notwithstanding, the existing provisions of the *Ontario Game and Fish Act* would continue to apply to Métis and non-status Indians. The repeated letters Mr. Belcourt sent to the Ministry of Natural Resources on behalf of the Métis Nation of Ontario produced nothing in the way of harvesting negotiations. As such, the *Game and Fish Act* continued to apply to the Métis and, by extension, to the Powleys.

> (Teillet) Q. Now, rather than taking us through these [letters to the MNR] inch by inch, Mr. Belcourt, what's the gist of them?

> (Belcourt) A. The gist is that we...we didn't get anywhere in terms of our petitions to...to bring about some negotiations. We didn't get anywhere in our petitions to even have meetings.
>
> Q. And what's the general reason?
>
> A. The general reason, the excuse is that they don't know who the Métis are or where the Métis are (Trial Transcripts, vol. 1: 137).

All of this is to say that Belcourt and the Métis Nation of Ontario had, prior to their use of litigation, pushed their attempts at negotiations with the Ontario government to their limit. In the end, they came up empty with respect to harvesting negotiations. As we will see in the following section, their turn to litigation as a means of countering the Ontario Ministry of Natural Resources' refusal to negotiate stems, in part, from the Canadian courts' relative sympathy to Aboriginal issues in the last thirty years.

PART II

How do courts matter (particularly now)?

In this section, I use insights from the social movement literature which focus specifically on the use of 'law', coupled with Pierre Bourdieu's discussion of capital and the translation of capital between social fields, to make some observations about the impact of the *Powley* decision on the political efforts of the Métis Nation of Ontario and Métis political organizations more broadly.

(a) translating capital

To briefly refresh our memory about Bourdieu's use of *social fields* and *capital*, recall that fields are primarily identified by the struggles of their agents over a particular resource, or capital. While the struggles over capital (i.e. the struggles to improve one's position within the field) are distinctive to each field, fields nonetheless hold several invariant properties; they are hierarchically positioned and thus, hierarchically reproduced; internal struggles follow a distinctive pattern according to internal sensibilities (although it is always itself dynamically changing); internal actors' believe deeply in the fields' legitimacy and effectiveness. Both the stakes of the struggle (i.e. the resources used to struggle) and the eventual outcomes of struggles within these fields are referred to by Bourdieu as *capital*. Thus, capital simply refers to resources drawn upon by social actors to struggle effectively to reproduce (either attempting to change or maintain) their position in the social order. Ultimately capital is power and is required by social actors to struggle effectively in the fields within which they are situated. In the context of the juridical field (i.e. the courts), juridical capital is secured through court victories in the form of the substance of the victories. Moreover, past victories (which accumulate capital) are a good indicator of future victories as it allows agents to struggle more effectively and to elevate their positions vis-à-vis other agents struggling within the field. In the context of the courts, the accumulation of past juridical capital can take the form of precedent deemed relevant for future cases.

Without entering into a full-fledged discussion of Bourdieu's sociology, we may note his suggestion that any "science of the economy of practices that does not artificially limit itself to those practices that are socially recognized as economic must endeavor to grasp capital…in all of its different forms, and to *uncover the laws that regulate their conversion from one into another*" (Bourdieu & Wacquant, 1993: 118 – emphasis added). That is to say, capital garnered in one field can often be converted into resources in another field (in fact, agents located in multiple fields are able to use capital gained in one field to make gains in another). For Bourdieu, the state represents a powerful boundary within which the (rate of) conversion of capital from one form to another (to use our situation, from juridical to bureaucratic) takes place. Certainly, Bourdieu was centrally concerned with what he perceived as the unnecessary simplification of 'the state', which, he argued, was erroneously constructed as a well-defined, clearly bounded and unitary entity (Bourdieu & Wacquant, 1992: 111). Yet, Bourdieu's notion of a structural homology (i.e. links) between social fields required him to stipulate an underlying 'meta-field' which orients the logics of dominance in any particular field (although always within the logic particular to the individual field). Bourdieu imploded these overly unified notions of the state, instead envisioning an ensemble of fields always jostling in competition with one other to accumulate and legitimate the form of capital deemed valuable to their field. In this sense, 'the state' is not coterminous with 'government':

> [i]n fact, what we encounter, concretely, is an ensemble of administrative or bureaucratic fields (they often take the empirical form of commissions, bureaus and boards) within which agents and categories of agents, *governmental and non-governmental*, struggle over this peculiar form of authority consisting of the power to rule via legislations, restrictions, administrative measures (subsidies, authorizations, restrictions, etc.), in short, everything we normally put under the rubric of state policy as a particular sphere of practices… (Bourdieu & Wacquant, 1992: 111 – emphasis added).

In other words, if social fields possess an (incomplete) autonomy based on their distinctive internal logics and practices and if competition within these fields ensues on a hierarchical playing field, the mutual struggle between actors located in multiple fields sets a 'conversion rate' of different kinds of capital and thus creates a hierarchy of different kinds of capital within state borders. Bourdieu's point, therefore, was that we need to account not for the relations of inequality between 'the state' and citizens but for the hierarchies of capital which exist and co-mingle within its broader geo-political boundaries. In fact, the job of the sociologist is precisely to demonstrate both the autonomy and linkages between these without collapsing them into a single, monolithic analytical category (Thompson, 1991: 25).

The formation of the rational state brought with it a centralization of pre-existing fields, each with their own specific species of capital and within which distinctive struggles ensued. Likewise, these fields began to compete for ascendancy between one another within the broader geo-political unit of the state:

> power struggles among holders of different forms of power, a gaming space in which those agents and institutions possessing enough specific capital…to be able to occupy dominant positions within their respective fields confront each other using strategies aimed at preserving and transforming these relations of power (Bourdieu, 1996: 265).

Bourdieu argues that as opposed to social fields in which agents compete for dominance over a specific kind of capital, struggles in the field of power are characterized by a fight to determine "the relative value and magnitude of the different forms of power that can be wielded in the different fields or, if you will, power over the different forms of capital or the capital granting power over capital" (Bourdieu, 1996: 265).

Struggles within the field of power are not merely struggles to determine which forms of capital are deemed dominant (i.e. economic, religious, cultural, etc.). Struggles over power in this context are inevitably also struggles over the attempt to legitimate one form of power (i.e. secure one's own form of power as symbolic) at the expense of others. To provide a brief example, in *R. v. Sparrow* the Supreme Court of Canada set itself up as a legitimate protector of Aboriginal rights in opposition to their alienation through colonial political regimes. In this context, the Supreme Court of Canada attempted to secure the symbolic legitimation of juridical capital at the expense of political capital, both at play in the Canadian state. One of this dissertation's goals was to register the tension between the Courts and the bureaucratic/policy field to better nuance the investigation for why Metis go to court to begin with. Namely, because the juridical field of the courts has ascended to a position of dominance over that of the bureaucratic field and the policy making taking place within them.

Bear in mind the differences between Bourdieu's construction of an interlocking matrix of social fields and the construction of 'law' underlying constitutive legal theories. In critiquing instrumental (i.e. 'external') theories of 'law', legal consciousness theorists take great pains to demonstrate that 'law' escapes the surly bonds of legal rules and legal formalism to touch all citizens. In this sense, 'law' is said to be everywhere and its normative force takes a myriad forms. Although at first blush the translation of juridical capital into other forms of capital in other fields appears to bear some affinity to constitutive arguments, it differs crucially to the extent that although juridical capital can be translated into various fields, some fields are more powerful than others. If 'law is everywhere', society is not an equal opportunity entity, such that the use of juridical capital in some fields holds a more powerful effect than its use in others. The conversion of juridical capital into one field in particular – the bureaucratic field – is important to the ability of Métis to attain harvesting aspirations. In this next section I will elaborate on the rise of the juridical field in Canadian politics and show the impact of this rise on the 'favourable exchange rate' of juridical capital in the political field.

To reiterate, like struggles which ensue *within* social fields, an important insight for Bourdieu is the fact that the struggle *between* the various social fields in the larger nation-state does not occur on an even playing field – like fields, competition between social fields is marked by hierarchies and power differentials. Notably in Canada, the past 135 years have borne witness to the change in form and content of our basic 'rule of law' such that we have moved from a parliamentary to a constitutional democracy. This movement has created an analytical context which must account for the supremacy of the courts over other social fields, in particular that of the Canadian political field, to properly understand why Aboriginal political organizations in particular use litigation as part of their broader political strategies.

Historically, Aboriginal communities were largely dealt with legislatively rather than through judicial decision-making (Morse & Giokas, 1995). This is no coincidence – the Canadian courts, unlike their American counterparts, historically acquiesced to the Canadian legislature.

> …Canada inherited the British constitutional idea of the unlimited sovereignty of the legislature, so that the only role of the courts was to define the boundary between federal and provincial powers. Thus the Canadian courts inherited a more deferential attitude towards legislatures and have been more reluctant to substitute their own judgment of what is constitutionally proper for that of Parliament or a provincial legislature… (Mallory, 1984: 2-3; also see Bushnell, 1992: 218-229).

In fact, until 1949, the Supreme Court of Canada was not even the final Court of Appeal but rather, ultimately deferred its decisions to the British Judicial Privy Council. This deferral to the Privy Council was a matter of course for early Canadian Justices, whose views tended towards judicial restraint and the abiding respect for the parliamentary supremacy noted by Mallory in the quote above. However, the relationship between the

Supreme Court of Canada and the British Judicial Committee of the Privy Council was often tense, a tension exacerbated by several celebrated Privy Council reversals of Supreme Court decisions such as a finding, in opposition to the Supreme Court of Canada, that the 'persons' noted in the *British North American Act of 1867* included women, as well as the 'New Deal' cases of the early 1930s (see Bushnell, 1992). This, coupled with a growing Canadian nationalism in the post World War I era, created the conditions under which, by 1930, the Judicial Privy Council could be seen as "a symbol of colonial dependence" (Scott, 1930 in Bushnell, 1992: 243).

The formal judicial paternalism between Canada and Britain was severed in 1949 and the Supreme Court of Canada became the Court of Final Appeals for Canada. Despite this new independence, however, in the first 20 years following the break the Supreme Court showed little inclination to assert its muscle, instead continuing to demonstrate 'judicial restraint', deferring to the conventional wording of legislative enactments. In other words, the principle of parliamentary supremacy, long a hallmark of English law and used to oust the Judicial Privy Council as the final Court of Appeals in Canada, still carried a heavy weight. It was not until the 1970s that the Court engaged seriously in the task of 'law reform' (see Bushnell, 1992: ch. 28), departing from the plain wording of several legislative enactments in a series of decisions. Moreover, the appointment of Bora Laskin to the Court had a marked impact on the 'law creation' impetus of the Supreme Court. Laskin was a legal realist and made no pretenses about his view that judges should play a role in legal reform (Bushnell, 1992: 391). His assent to the position of Chief Justice of the Supreme Court of Canada heralded a new era of judicial 'law-making' which was to become further entrenched by the formation of a 'national significance test' which required all cases asking for leave of appeal to the Supreme Court of Canada to demonstrate their 'public importance' (Bushnell, 1992: 405).

Far and away the most significant impact on the visibility of the Canadian courts' political role is, however, the *Charter of Rights and Freedoms*. The Charter turned Canada from a parliamentary democracy to a constitutional one (Dickson, 1984) and placed the Supreme Court of Canada right at the centre of political dialogue in Canadian society. Interestingly, far from attempting to disguise its newly overt political status, the Supreme Court of Canada embraced it by arguing that under the Charter the courts "are to uphold the Constitution and have been expressly invited to perform that role by the Constitution itself" (*Vriend v. Alberta*, 1997: para. 137). Likewise, the court justices argued that their position in Canadian society was the result of "the deliberate choice of our provincial and federal legislatures" (para. 132), who envisioned a court which acted as a "trustee or arbiter…[to] scrutinize the work of the legislature and executive not in the name of the courts, but in the interests of the new social contract that was democratically chosen" (para. 135)[121].

Manfredi (2001) argues that the courts' new activism resulted from "a weakening in the institutional constraints on the Court's ability to assert constitutional supremacy over the legislative and executive branches of government: (2001: 5). "Indeed", he went on to say, "one can argue that *Vriend* represented the boldest step in a sequence of institutional interactions that promote[d] the transition from *legislative* to *judicial* supremacy in Canada" (2001: 5 – emphasis added). Thus, whether we believe that the courts' new power is positive (i.e. Gibson, 1987), negative (i.e. Hutchinson, 1995; Mandel, 1994) or pragmatically useful (Borrows, 1997a; Razack, 1991), broad consensus exists that this power increased dramatically after the inception of the Charter.

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[121] These passages are taken directly from the *Vriend* (1998) case, which although it focused on whether the *Alberta Individual Rights Protection Act* included the right to gay marriage, discussed broader principles about the place of the courts in Canadian Law. The reference to the case was originally found in Manfredi's (2001: 4) discussion regarding the increasing activism of the Supreme Court of Canada.

To cast this movement in a more Bourdieu-oriented vocabulary, we might say that the Supreme Court of Canada has improved its position in the larger Canadian political *field*. In fact, it currently holds a dominant position in this field; this is what makes going to court so enticing for Aboriginal litigants in that in the last thirty or so years they have made real gains using a litigation strategy. The importance of these wins is exacerbated by the fact that the Courts have assumed such a powerful role in contemporary society and more importantly because government rarely deals with Aboriginal concerns unless mandated by the courts – I discussed this issue earlier in reproducing Belcourt's testimony in *Powley*. Additionally, according to the Powley's legal team's factum,

> [t]he Game and Fish Act does not recognize Métis as having *any* Aboriginal or treaty rights. The IEP [Interim Enforcement Policy] purports only to accommodate Métis harvesting rights pursuant to a negotiated agreement. No such agreement with Métis has ever successfully been negotiated. MNR only agreed once to enter into such negotiations and ever since has refused to enter into negotiations to enable the application of the IEP for Métis (Powley Factum, 2002: para. 10).

As I explain in chapter eight, the *Powley* decision is too recently delivered either to allow for broad pronouncements on its echoes in broader non-Aboriginal Canadian society, or to explore the legal meanings that Métis politicians and Métis more generally attribute to it. However, in the rest of this chapter I will elaborate more fully on why minority community members like the Powleys go to court in the first place and what (in theory) these court decisions are supposed to secure, and what evidence exists for the optimism which followed the *Powley* decision at the Supreme Court of Canada.

(b) why go to court?

At one level, the objective of this dissertation is to demonstrate the benefits and drawbacks of Métis political organizations' recent turn to litigation as an important element of a broader political strategy in the context of their struggle with the Ontario bureaucratic field. More broadly, it also focused on the broader implications of the decision in the Canadian political field. As it stands, juridical capital gained in court victories serves as an important marker in the Métis Nation of Ontario's struggle with the Ontario government's Ministry of Natural Resources. That is to say, the courts (currently) function as both a 'force multiplier' and a powerful source of authority to "persuade officials to change their conceptions of their professional responsibilities and to coerce them to change their official interpretations of policies and practices" (Harris, 1998: 119). In this sense, the point of going to courts is to secure *oppositional* interpretations of officially inscribed legal conventions as they appear in policy; juridical capital is particularly important to secure at this point in time because of its favourable exchange rate. Courts thus represent a powerful tool in that "the power to induce change is derived from…the threat of increased judicial intervention as a "club" to pressure official actors to implement reforms" (Harris, 1998: 119-120; also see McCann, 1998).

The thesis forwarded by Harris expresses in a slightly less abstract way the theoretical trajectory endorsed by Alan Hunt's (1993) work on the relationship between 'law' and social movements. Hunt argues that a key shortcoming of critical legal theorists who advocate strongly against using the courts as a basis for progressive social change is that their alternatives (i.e. 'revolution') fails to realize that all social movements take place on ground already scarred by previous battles. Thus, when a social group seeks change, their struggles have the best chance of success when they begin on old ground. In these situations, Hunt argues, 'counter-hegemonic' discourses must, win or lose, attach themselves to existing dominant discourses while at the same time attempt to transcend those discourses.

> The most significant stage in the construction of counterhegemony comes about with the putting into place of discourses, which while still building on the elements of the hegemonic discourses, introduce elements which transcend that discourse… the effect of the process is the dying away or exhaustion of elements once dominant (Hunt, 1993: 233; also see Crenshaw, 1988).

Thus, Hunt explains, social movements should avoid attempting to construct discourses out of thin air (as though that were possible) instead (using one of Gramsi's famous binarisms) focus on attempting to draw 'good sense' from 'common sense'. Whether victorious or not, court decisions can "put in place a new or transformed discourse of rights that goes to the heart of the way in which the substantive issues are conceived, expressed, argued about, and struggled over" (Hunt, 1993: 240).

One of the larger conceptual issues which arises from this argument is the extent to which court decisions remain in step with the discursive framework of the larger societal opportunity structure (see McCann, 1998), particularly for social movements, like the recent Métis manifestation through the Métis National Council and its constituents, who possess little in the way of institutional or material resources. While court victories can represent a shot in the arm for social movements, "[i]n the absence of sustained political pressure, politicians and administrators are able to draw on both their political authority and organizational resources to delay or subvert commitments to respond to the social problems" (Harris, 1998: 118) raised by court decisions. To situate this in a more Bourdieu-oriented discussion, the past capital built up by politicians and administrators in the bureaucratic field allows them in some cases to circumvent or thwart the capital gained by less powerful players (like the Métis) in the juridical field. We can view, if only partially, the views of government through an examination of the intervener factums they forward in specific court cases such as *R. v. Powley.*

Ultimately, the issue of whether to go to courts and concomitantly the extent to which it can be said to contribute to a broader political strategy can, according to Judy Fudge (1992: 154), be usefully evaluated by asking a number of questions:

> Does the legal struggle generally and rights discourse in particular help to build a social movement? Does articulating a right advance political organizing and assist in political education? Can a right be articulated in a way that is consistent with the politics of an issue or that helps redefine it? Does the transformation of political insight into legal argumentation capture the political visions that underlie the movement? Does the use of rights keeps us in touch with or divert us from consideration of and struggle around the hard question of political choice and strategy?

Clearly, Métis political organizations had run the gambit of political opportunities with respect to their relationships with federal and provincial government bureaucracies. Of more specific relevance for the present research, the Métis Nation of Ontario had hit a brick wall with respect to getting the Ontario government to agree to negotiate on the issue of Métis harvesting rights. Therefore Métis political organizations decided to litigate (and to support the decision to litigate by one of their Métis community members) because, like First Nations litigants before them, they wished to force a governmental agency to the table to deal with harvesting rights. At this point, it is too soon to tell the effects of the *Powley* decision in particular and litigation-based strategies more generally.

However, the rest of the chapter explores some of its immediate after-effects (both positive and negative), bearing in mind Harris' (1998) earlier warning about legal victories which do not hold the more broadly based support of government authorities.

(c) After Powley: *new rights or old hat*[122]*?*

Each level of court rendering a decision on *R. v. Powley* ordered the Ontario government to enter into negotiations with the Métis Nation of Ontario and the Ontario Métis Aboriginal Association. In 2001 the Court of Appeal for Ontario also agreed with the Ontario government's request to stay the effects of the decision for one year to allow for negotiations to take place. In effecting this stay, however, the Court admonished the Ontario Crown for their indifferent attitude towards section 35 Aboriginal rights for Métis:

> The [Ontario Crown] has led no evidence to show that it has made a serious effort to deal with the question of Métis rights. The basic position of the government seems to have been simply to deny that these rights exist, absent a decision from the courts to the contrary. While I do not doubt that there has been considerable uncertainty about the nature and scope of Métis rights, this is hardly a reason to deny their existence. There is an element of uncertainty about most broadly worded constitutional rights. *The government cannot simply sit on its hands and then defend its inaction because the nature of the right or the identity of the bearers of the right is uncertain* (Court of Appeal, 2001: para. 166 – emphasis added).

In the months following the Ontario Court of Appeal decision, the Métis Nation of Ontario (along with the Ontario Métis Aboriginal Association) engaged in a number of negotiations[123] with the Ministry of Natural Resources for the province of Ontario. Tony

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[122] This title is paraphrased from Denis (1995: 365).

[123] The Métis Nation of Ontario received $225,000 from the Ontario Native Affairs Secretariate (a sector of the Ontario government) to facilitate negotiations on a harvesting policy (www.metisnation.org/harvesting/negotiations/nego_articles_4.html - April, 2004).

Belcourt, President of the Métis Nation of Ontario, stated his hope that "the Government of Ontario would take the opportunity of these negotiations to initiate *an overall change* in the government of Ontario's positions and policies with respect to the Métis Nation[124]". Although they were unable to reach an agreement prior to the fall hunt (of 2001), the Métis Nation of Ontario and the Ontario Ministry of Natural Resources did arrange a kind of 'cease fire' in the short term. This consisted of the development of "a "Harvesting Protocol" that would allow Métis hunters to hunt without fear of Ministry of Natural Resources seizing their meat or equipment, although until a final agreement was implemented, the Ministry continued to hold the position that they could, if they desired, lay charges[125]. Negotiators for the Métis Nation of Ontario took the opportunity of the negotiations with the Ontario Ministry to educate government officials on Métis living in Ontario, their historical communities (and their contemporary descendent communities) and the Métis Nation of Ontario registry to (presumably) allay Ontario provincial fears of a 'million man march' into the bush during hunting season.

In rendering their decision, the Supreme Court of Canada noted in September of 2003 that, although the stay of judgment granted by the Court of Appeal for Ontario ended nearly eighteen months before the Supreme Court delivered its judgment, "chaos does not appear to have ensued" and therefore, they saw "no compelling reason to issue an additional stay" (Supreme Court of Canada, 2001: para. 52). The months immediately following the Supreme Court of Canada *Powley* decision saw a change in both the Ontario provincial government as well as a change in leadership of the federal government. Thus, while Métis Nation of Ontario President Belcourt hoped that "with the Supreme Court ruling we would have the access to government that we needed to finally make the free exercise of Métis harvesting rights a reality in Ontario[126]", the new government of Ontario did not appear to share that view. Instead, the new Ontario Minister of Natural Resources decided to "deal with Métis harvesters on a "case-by-case" basis".

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[124] http://www.metisnation.org/harvesting/negotiations/nego_articles_2.html (April, 2004).

[125] http://www.metisnation.org/harvesting/negotiations/home.html (April, 2004).

Belcourt quotes part of a letter from the Deputy Minister, which stated: "In order to maintain good relations in the field, [the Ministry of Natural Resources] has also extended many of the provisions of the MNR-MNO Protocol, including the policy of leniency to seizures and the continued liaison with MNO Hunt Captains, on all incidents involving MNO harvesters[127]". As part of this 'case-by-case' stance, the Ministry of Natural Resources is requiring anyone caught without a provincial licence and game tag who is claiming a section 35 Métis right to hunt to fill out an information letter. In his letter to Métis Nation of Ontario citizens, Belcourt cautions MNO harvesters to act carefully, in that they "may not want to respond to the letter because any responses…provide[d] can and will be used against you should the matter go to court[128]". In part, the letter given to MNO harvesters from Ministry officers reads

> in order for the Ministry to be able to properly evaluate your claim of Métis rights, the Ministry requires the kind of evidence and documentation that the R. v. Powley case suggests is necessary. We would therefore request that you forward any relevant evidence and documentation within one month of the date of the receipt of this letter. You are not obliged to provide any information unless you wish to do so, but whatever you provide may be used as evidence. If no

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[126] http://www.metisnation.org/news/03_Dec_MNRpostpowreport.html, page 1 (April, 2004).

[127] http://www.metisnation.org/news/03_Dec_MNRpostpowreport.html, page 1 (April, 2004).

[128] http://www.metisnation.org/news/03_Dec_MNRpostpowreport.html, page 2 (April, 2004).

> information is received within that period, the Ministry will review the incident based on the information it has available (Covering Letter Métis Rights Claimant, n.d.).

These changes in the relationship between the Ministry of Natural Resources and the Métis Nation of Ontario took place following the Court of Appeal decision and largely prior to the Supreme Court decision. More recently in November of 2003, Ministry of Natural resources officers, along with members of the Ontario Provincial Police-Southern Georgian Bay detachment (calling themselves a 'High Enforcement Action Team' – 'HEAT'), seized the catch of a Métis commercial fisherman in Thunder Bay, Ontario (about five hours north west of Sault Ste. Marie, Ontario). The Métis fisher was cited with under-estimating his catch and although official say charges are pending, none were laid. In immediate response, Tony Belcourt stated that

> [MNO] is anxious to build a new relationship with the newly elected government at Queen's Park. But even before we have had the opportunity to meet Ministers concerning the implications of the recently announced landmark decision of the Supreme Court of Canada in R. v. Powley which recognized Métis rights, officials have resorted to heavy handed tactics which clearly have the appearance of continuing the practice of using the media to turn public opinion against the Métis[129].

The next day, in an interview with the Aboriginal Peoples Television Network (APTN) National News correspondent Rick Harp, Belcourt stated that

> (Belcourt) A: "…Mr. Lepage[130] hasn't been charged with anything. That [what's] so strange about all of this. We have this huge public opinion against the Lepages and the Métis people by the MNR and by the OPP. Yesterday the MNR said to a reporter in Ontario that they apparently sent out news releases to send a clear message to the public that unfair fishing practices would [not be tolerated]. As if he's already been charged and found guilty of something, when he hasn't even been charged [with] anything. This is really just about a painting of public opinion against the Métis people. That's what this is all about.

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[129] http://www.metisnation.org/news/03_Nov_MNRsting2.html (April, 2004).
[130] The commercial fisher whose catch was seized.

> (Harp) Q: Would you go so far as to call it harassment?
>
> (Belcourt) A: Absolute harassment and intimidation. I got the call today from Dudley George's brother[131] to say that he heard the news and he understands exactly what's going on. He just wanted me to know that people out there in the communities… [understand] exactly what's going on here[132].

Ultimately, Belcourt suggests that the whole event was nothing more than a cheap publicity stunt by the Ontario Provincial Police to portray Métis fishers as criminals. Belcourt argued that although the cited infraction was the commercial fisher's underestimation of his catch, it is a common practice to estimate the catch and wait for the official weight at the processing plant. In this instance the fisher had underestimated his catch – equally likely, in another instance on another day he would have overestimated it. Belcourt stated that

> *[w]e have a hard time believing that this sting operation is not a reaction to the historic Powley decision which recently upheld Métis rights.* And, we also wonder why this took place immediately following a complaint to the Deputy Minister concerning the discrimination, intimidation and mistreatment of the Lepage family by the MNR for several years[133].

Moreover, Belcourt stated that "[m]any Métis are saddened that the OPP has seen fit to smear our whole community. One has to ask why the OPP went out of their way to issue a media release designed to reflect badly on our Métis community", a decision, he says, reminiscent of the tactics used by nineteenth century government officials to turn public opinion against the Métis through the media (see Lytwyn, 1998).

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[131] Dudley George was an Anishinabe protester shot and killed by members of the Ontario Provincial Police. The incident is currently the subject of an Ontario public inquiry.

[132] http:/www.metisnation.org/news/03_nov_MNRaptn2.html (April, 2004).

[133] http://www.metisnation.org/news/03_Nov_MNRstatement.html (April, 2004 - emphasis added).

Conclusion

At this point, the outcome of the *Powley* decision appears mixed. In the wake of the decision, Métis have (for the first time) been allowed access to negotiations with the Ontario Ministry of Natural Resources such that Métis Nation of Ontario hunters are no longer forced, in the words of the original Ontario Court of Justice decision, to "skulk through the forests like criminals" (Ontario Court of Justice, 1998: para. 124). Moreover, the Métis Nation of Ontario has entered into discussions with the most powerful outdoor recreational sport lobby in Ontario, the Ontario Federation of Anglers and Hunters, who support the Métis Nation of Ontario in their pursuit of conservationally responsible exercising of their section 35 rights[134].

Conversely, the actions of the Ontario Provincial Police and members of the Ministry of Natural Resources against Métis commercial fishers suggests that at least some members of the Ontario government are not particularly happy about the outcome of the *Powley* decision. To challenge Jean Teillet's quote beginning the chapter, it seems in fact that not "all governments recognize that they…fundamentally have to change their policies now". Moreover, although the Métis National Council has also gained unprecedented access to new Prime Minister Paul Martin (including several direct meetings with him, an explicit mention for the first time of Métis in Prime Minister Martin's Speech from the Thrown and an Aboriginal summit between the Prime Minister's Office and the three national Aboriginal political associations), it is not clear whether new access means anything other than symbolic or, for that matter, whether the

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[134] http://www.metisnation.org/harvesting/harvest_related_1.html (April, 2004).

Powley decision led to the opening of these doors[135] (although it certainly could not have hurt).

Ultimately, in this instance a victory was preferable to a defeat, but the fact of the matter is that Métis hold very little social power to begin with such that, to repeat Paul Chartrand's refrain in the introductory chapter, the weak accept what they must. Anecdotally, the *Powley* decision appears to have given a tremendous boost to many Métis who neither hunt nor fish on a regular basis and certainly not as an integral part of their lifestyle or diet, especially the Supreme Court of Canada's words that Métis are 'fully Aboriginal'. It is far too soon however, to write either a congratulatory speech or an epigraph. We simply do not know the full effects of *Powley*, nor will we for some time to come. At the very least, it has brought Ontario provincial negotiators to the table with Métis hunters, whereas in the words of Jean Teillet the previous Ontario government policy with respect to Métis harvesting consisted of two letters: 'N-O'[136]. Whether it can be parlayed into broader based rights in the future awaits a future investigation.

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[135] Paul Martin was known previously for his sympathetic views towards the conditions of Aboriginal peoples in Canada.

[136] Jean Teillet "Historic court win for Metis; Can claim aboriginal right to hunt for food 9-0 Supreme Court ruling upholds acquittal." *Toronto Star*. September 20th, 2003. A13.

CONCLUSION

This dissertation focused primarily on two under-explored issues in contemporary sociology of law scholarship: (1) the persistence of discourses around racial and cultural purity in the ways that contemporary Canadian courts attempt to position the legitimacy of Métis Aboriginality, in the context of both their post-contact origins and their mixed ancestry; and (2) the positioning of 'law' in a way that, on the one hand, situates the courts as an impractical social entity consisting of more than just court *decisions* and on the other, accounts for the tensions and antagonisms which underlie bodies of 'law' (and the subsequent analytical consequences of this acknowledgment).

Regarding the first objective, I drew on insights from critical legal and critical race theory to make the obvious but controversial point that (to use a more specific vocabulary) courts do not work in *spite* of racism but rather *because* of it. That is to say, racism constitutes 'business as usual' and like all dominant discourses, it possesses the ability to marginalize alternative ways of understanding social reality. One of its effects in the present court case is the establishment of a norm of Aboriginality predicated on a juridically constructed historical authenticity. Indeed, the racism which pervades the *Powley* case files is not new – courts and court files are a loose reflection of larger historical and contemporary social relations and in this sense, the discourses which form the basis of the case files in *R. v. Powley* bear the mark of the centuries old stains that both prefigured and precipitated the formation of the Canadian state itself. In chapter one I explored how these trajectories of racial and cultural difference, germinated in the initial contact between indigenous communities and nations and 'settlers', were nurtured in the colonizing landscape of nineteenth century Canadian state building projects around land title and how, in contemporary critiques, they continue to bear weight.

This posit(ion)ing of difference between 'indigenous' communities and Canadian citizens represents one of the primary tensions of empire involved in the formation of both the Canadian state and the British colonial presence which preceded it. These tensions continue to anchor the discourses of racial and cultural difference orienting juridical discussions in *R. v. Powley*, and insofar as their discursive power persists, they make *Powley* a bitter-sweet victory. On the one hand, the Supreme Court of Canada decision puts Métis Aboriginality on more equal footing[137] with First Nations, in a number of ways. First, it is a definite improvement over a Court of Appeal decision for Ontario which required a comparison with local First Nations practices to determine authenticity. Second, in positioning authenticity as a pre-colonial rather than pre-contact phenomenon, the Canadian courts ordained a discursive space for Métis as Aboriginal people in a way wholly at odds with the precedent set in *R. v. Van der Peet* (1996). Third, the constructions of Métis as 'mixed' which continue to circulate in more popular non-juridical understandings (and adopted in many of the intervener factums more specifically) were dismissed in favour of understandings which required community acceptance and self-identification. Fourth, although outside the scope of this research, *R.*

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[137] Too much so, in fact. The Supreme Court of Canada decision argued that in the short term, Métis practices protected by section 35 must follow the contours of existing Ojibway practices. We may assume this is to prevent a raft of commercial fishing rights cases, a pre-colonial activity engage in by 'Métis' around Sault Ste. Marie.

v. Powley represents a marked improvement over earlier cases which required demonstrating an 'Indian lifestyle' in order to engage in an Aboriginal right[138].

The progressiveness of this court decision is made all the more stark by an examination of the discourses produced by various legal actors, particularly the Supreme Court of Canada level Attorney-Generals' interventions. In these factums, Métis were variously constructed as mere mixed blood individuals (in which case their authenticity as Aboriginal people was located in their Indian ancestry) or even more conservatively, were etymologically written out of the Constitution entirely; an apparently 'plain reading' of the term Aboriginal cannot include Métis. In fact, the B.C. Fisheries Survival Coalition went so far as to chastise the framers of the Canadian *Constitution Act, 1982* for including Métis in section 35 at all. Likewise, other interveners sought to exclude the Powleys as insufficiently Aboriginal by virtue of their lack of 'Indian blood'.

On the other hand, the constructions of Aboriginality which predominate in *R. v. Powley* are deeply troubling with respect to the stereotypes of Aboriginality upon which they rely. As I elaborated briefly in the conclusion of chapter six, the victory secured in *R. v. Powley* is in many ways a hollow one, in that it secured protection for rights that most Métis will never use. Moreover, it relied upon (and reproduced) stereotypes which, although not untrue in the sense that they accurately describe *some* Métis communities, establish a legal norm for Aboriginality which is largely out of step with the lifestyles and contemporary cultures of many Métis in Canada today. While it is true that other parts of the *Constitution Act* may eventually be found to apply to urban Aboriginal communities, it nonetheless begs the question why section 35, which currently comprises a bulk of the constitutional protections for Métis claimants, should not. The answer, of course, stems from *R. v. Van der Peet's* construction of Aboriginality as essentially historical.

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[138] See Andersen (2000). Ironically, most status Indians hold specifically enumerated treaty rights such that they are not required to demonstrate an 'Indian lifestyle'.

Likewise, 'whitestream' judges appointed from the ranks of upper middle class Canadians with little or no contact with Aboriginal communities (outside, perhaps, of any previous litigation they engaged in as lawyers) are called upon to make decisions about Aboriginality without anything like an adequate knowledge base for understanding its contemporary complexity. Although it may well be true that Canadian judges can be swayed by both public outcry and policy considerations, the means by which such issues form their opinions is far more subtle than current models dictate. That is to say, often the public pressure that judges feel does not require a wrenching internal struggle between their judicial and non-judicial 'selves'; rather, it accords closely with their own sensibilities about the issue, garnered through their middle and upper-middle class upbringings and socialization experiences. In this sense, public pressure is unlikely to cause judges to render decisions which contrast with their judicial *habitus*; and in any case, these external pressures are *always* incorporated in ways which allows them to remain faithful to juridical doctrinal requirements.

In this sense, critical legal theory constructions of legal indeterminacy need to be retooled to better account for the fact that court decisions tend to reproduce existing 'status quo' conditions (or at least, reproduce the ground upon which those struggles take place). It seems odd on the one hand for critical legal theorists to decry the conservatism of the courts (i.e. their overwhelming tendency to produce decisions which favour already-advantaged groups) yet continue to cling to the idea that legal decision-making is indeterminate. Likewise, there is something puzzling about their critiques of legal formalism (i.e. that a particular fact situation leads to a particular legal outcome) when they present an equally formulaic construction of the effects of structural conditions (such as capitalism) leading to equally predictable outcomes. The ranks from which judges (and, for that matter, lawyers) are chosen impact their socialization experiences in such a way as to limit the kinds of meanings they can derive from the texts they read and thus, shape the kinds of texts they can produce. In the context of *R. v. Powley*, these circumscriptions were held by a vast majority of the legal actors (with one notable exception); virtually all held in common a construction of Aboriginality as a pre-colonial, land-based phenomenon. Thus the court decision was a result not just of juridical conservativism, but because virtually *all* legal actors clung to an underlying construction of Aboriginality.

Because of this broadly held underlying consensus, whether courts hold the ability to provide broader safeguards for Métis communities – especially urban communities – is a complex issue. Métis Aboriginal rights, although not limited to section 35, have for the most part been recognized through litigation focusing specifically on this section. It is difficult to see how Métis litigants will be able to avoid the stereotypical constructions of Aboriginality which accompany the *Van der Peet* test, even one modified to include Métis. This is particularly an issue for Métis since, as I discussed briefly in chapter six, they are becoming an increasingly urban population. An important if obvious point to make in this context is that urban Métis are not wandering aimlessly around the city – they have coalesced into viable, enduring and *new* communities. These urban communities contain second and third generation members who have never been nor have any significant connection to the land of their parents, grandparents, and ancestors. This generation lives in a melting pot where they interact and associate with a diversity of people on a scale unimaginable by their grandparents or even parents (see Newhouse 2000). Yet, many continue to identify with an indigenous community that formed after (in a sense, in reaction to) colonialism and as such, remain ineligible for section 35 constitutional protections.

My point here is that we need to take seriously the idea that our constructions of Aboriginality "not be limited to those activities that only aboriginal people have undertaken or that non-aboriginal people have not" (*R. v. Van der Peet*, 1996). Clearly, despite its own admonition against it, the Supreme Court of Canada has based the logic of its Aboriginal rights test precisely on the degree to which Aboriginal communities are able to differentiate themselves from broader Canadian norms through proving their pre-colonial presence. Yet there is little about urban Native communities different *enough* – according to current judicial tests – to warrant protection by the Supreme Court of Canada under section 35. In fact, in many cases the aspirations (or lack thereof) and material conditions of urban Aboriginal community members are difficult to distinguish from those of non-Native people, many of whom are part of the same community.

This is not to say, though, that urban Métis (or Native) communities are not distinct or recognizably autonomous from other communities. Distinctiveness does not exist *au naturel* but is found and strategically employed in the context of larger political projects. Choosing elements of distinctiveness is an arbitrary process in that one chooses to highlight different elements of distinctiveness in accordance with specific strategies and contexts. To phrase this more theoretically, "identities are about using the resources of history, language and culture in the process of becoming, rather than being…" (Hall, 1996: 4). The important issue is thus not whether Native communities (or any community for that matter) are distinctive, but rather, who makes the decisions about what counts as distinctive. The litany of statistics (see Statistics Canada, 2003) demonstrates that urban Métis face many of the conditions faced by other impoverished citizens. Yet they continue to use the resources at their disposal – history, language, elements of culture – to (re)construct indigenous collectivities. Many will recognize things about them that are indigenous – others (judges included) may not. Either way, urban Métis will continue to self-identify as such and continue to coalesce into distinctive urban communities.

My point here is not to suggest that any set of practices can be called 'indigenous'. Clearly, many who grew up close to the land will recognize themselves in conventional descriptions of indigeneity which lack an 'urban' element. That is perfectly legitimate for them to do so. However, there is an exponentially increasing urban Native population which will recognize little of their 'selves' in conventional narratives but who will still identify as Métis, or Cree or Dene or whichever other identity community to which they feel an allegiance. Alternatively, in a more complex sense they may begin to identify as Métis or Cree or Dene *from Edmonton* or *from Alberta*[139]. In any event, we are long past the time when urban residence can be understood as a recipe for assimilation. Urban Aboriginal people may recognize themselves as Native in different ways from those living on reserve, Métis settlement or more remote area (such as the Northwest Territories or Nunavut), but they nonetheless still recognize themselves as indigenous; and if they self-identify, they will attach to an urban indigenous collective of some kind.

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[139] I would like to thank Roger Maaka, a Maori scholar and Chair of the Department of Native Studies, University of Saskatchewan, for his helpful discussion in this regard.

Ultimately, insofar as identity is contingent and dynamic there should be nothing about indigenous identities beyond re-evaluation of its membership. That is to say, the issue of *who* gets to decide what it means to be indigenous is far more important than *what* counts as indigenous because culture will change as the social conditions of indigenous communities change. Living in contemporary Canada, especially in a relatively resource-weak position, requires hard choices; it might lead communities to go back to the bush, but more likely it will require that community members leave reserves and settlements to gain an education or to find work. These members will reform in different but analogous ways in Canada's towns and cities. Either way, the principle of collective self-identification is of primary importance and not the 'content' of a particular culture. Nor, for that matter, should the historical importance of community practices dictate those which can receive constitutional protection today.

Moreover, it is important to remember that, constitutionally speaking, rights emanate at least partially from the historical Métis *community* existing prior to the effective assertion of sovereignty by the Canadian state, not just their cultural distinctiveness or difference (although, in the juridical field this amounts to the same thing). Since the rights spring from the historical society and not just their cultural practices, constitutional protections should spring from the same source: that is to say, they should protect the maintenance (or rebuilding of) remnants of the Métis community, not the fragmented practices which comprised a particular part of it. A community's distinctiveness cannot be used as the marker, since it is difficult to look at *any* community and not find something distinctive about it. For example, none of us give much thought to questioning the distinction made between, say, Saskatchewan and Manitoba, despite their similar histories, economies and populations. Their jurisdictional separateness is largely taken for granted both politically and in popular consciousness, and indeed those who live within the boundaries of the respective provinces can spend hours expounding the differences. Conversely, however, outsiders can simultaneously spend hours describing similarities.

In short, focusing on the protection of Aboriginal communities *per se* rather than pre-conceiving an appropriate form allows these collectivities the geographical and cultural change required to ensure a viable future. Take for example the following statement from the Métis National Council's submission to the Reference Group of Ministers on Aboriginal Policy:

> …our people continue to be the poorest of the poor within this rich country. Due to the on-going jurisdictional game played between the federal government and the provinces the gap between our children and the children of other Canadians continues to widen at an alarming rate. Are our children not worthy of basic health care needs that are readily available to other Canadians? Are our veterans not worthy of the same recognition given to other soldiers who have gone off to defend Canada? Are our communities not worthy enough to be able to position themselves to become economically viable? Unfortunately, the answer under the current federal approach to all of these questions is 'yes' (Métis National Council, 2002: 2).

The Métis National Council's frustration stems not from the fact that the federal government refuses to acknowledge their 'indigenous difference' but because the government refuses to treat them as *distinctive from yet with needs similar to*, 'other Canadians'. The distinctive relationship between the Métis and the Canadian state should not arise simply from their cultural difference, but from their collectivity.

Fundamentally, the problem with Aboriginal rights as currently conceived is that Canadian jurisprudence refuses to recognize indigenous modernity. As one noted Aboriginal scholar concludes:

> [i]t is a good thing the rights of other Canadians do not depend on whether they were important to them two or three hundred years ago. What would it be like for Canadians to have their fundamental rights defined by what *was* integral to European peoples' distinctive culture prior to their arrival in North America? (Borrows, 1997b: 30)

Métis culture – and communities – has and have, like whitestream Canadian culture and communities, changed over the past centuries. Moreover, all Aboriginal societies, Métis society included, far pre-date that of Canadian society, whose legitimacy as both real *and* intrinsically dynamic is largely taken for granted. Thus, Canadian statute and common law does not work to prevent Canadian society from changing; instead, it expects it and is thus concerned with shaping the pace and form of this change. Yet, Aboriginal rights law pertaining to the Métis is charged with doing precisely the opposite: its role is to act as a curator to ensure that Aboriginal culture does *not* change or at least, does not change in a way which erases their perceived difference from mainstream Canadians.

Notwithstanding the second objective of the dissertation, chapter six might have constituted a legitimate analytical place to end. This dissertation adequately addressed the issue of 'the relationship between race and Law' or more specifically, 'the role of race *in* law' in the specific context of the explication of Métis section 35 rights, while demonstrating the enormous problems in using this particular language. In this sense, we could easily exclude chapter seven altogether. However, it is in many ways the most valuable chapter from the stand point of critiquing sociology of law scholarship's overly homogenous and overly unified construction of 'law'. Chapter seven built upon the omissions of chapter two, which moved away from the notion of 'constitutive law' towards a 'generative court'. This conceptual movement was crucial not only to problematizing analyses about how 'law' operates as a constitutive force, but more specifically to highlight the tensions and (currently) hierarchical positioning of juridical and bureaucratic capital in Canada.

Currently enjoying the lofty heights with respect to its conversion into bureaucratic capital and its place in the Canadian consciousness, 'law' needs to be brought back to earth. For all the labour they invested in their critiques, critical legal studies and critical race theory have failed to present an appropriately antagonistic and internally heterogeneous construction of 'law'. Concomitantly, they have failed to properly analyze the social distance between court decisions and the eventual construction of social relations. In failing to do so, these traditions have yet, to borrow one of Michel Foucault's (1978) famous phrases, to 'cut the head off the king'[140]. In continuing their romance with 'law', such critiques both oversell its power for promoting social change (whether positive or negative) and undersell its analytical importance for understanding the complexity in attempts to do so.

Earlier in the dissertation, I wrote that most models of 'law' position it in such a way that it struggles too little and produces too much. Particularly in the context of constitutive theories, the real complexity of 'law' as an antagonistic set of social fields, each shot through with competitive tensions and fissures, is lost in a barrage of research studies which, in their zest to displace liberal theories premised the notion that 'law' is neutral or disinterested, imbue 'law' with a constitutive power it neither possesses nor deserves. From a methodological and empirical stand point the sociology of law field is thus ill-equipped to carry out a complex investigation of the impact of 'law' on social relations. Partly, this is a result of the fact that a lot of the critical legal and critical race theory critiques of 'law' are carried out by doctrinal scholars interested specifically in court decisions and logical evaluations about whether judges 'got it right'. As such, they spend little time adumbrating more nuanced analyses of the impact of court decisions on social relations, let alone examine the corpus of case files within which judges are positioned when they make decisions[141].

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[140] Although Foucault was referring specifically to the fact that western legal scholars remained (too) enamoured with 'legal rules' conceptions of 'Law' and were neglecting the governing of society which occurred in even the most 'non-legal' of places, this

Conversely, although sociology of law scholars located in non-law faculties have investigated the effects of court on broader social relations, they have to date largely contented themselves with merely studying the decisions themselves rather than investigating more deeply the discursive fabric upon (and within) which such decisions are printed. It seems to me that the logical conclusion to draw from these shortcomings is that before we decide to do away altogether with sociology of law analysis focusing on courts (as many legal consciousness theorists would prefer), we need to push our analyses of courts and court *files* to more fruitfully mine the information they produce. Court decisions are but the tip of the iceberg; to properly situate the courts as a particular 'node'

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argument can easily be extended to critique those constructions of 'Law' that are too unified, too homogeneous and, as such, too simplistic.

[141] For the most part, this is a fair enough niche for doctrinal scholars. Most critiques state baldly their express intent to critique judicial opinions.

of power in the broader political field (crucial for understanding why 'minorities' use the courts to begin with), we should examine the political discourses brought before the courts through factums and within which judges are situated in rendering court decisions. In fact, insofar as social groups continue to dedicate resources towards litigation, specific attention needs to be paid to the place that courts play in their broader political strategies, and the form their political strategies take in the courts.

If sociology of law scholarship wishes to differentiate itself from jurisprudential critiques, our focus must be on investigating the broader impact of *the courts* (as opposed to court decisions) on social relations. This is no surprise – as Hunt (1993) points out, studying the effects rather than the internal logic of court decisions represents one of the primary differences between jurisprudence and sociology of law. Opening up the horizons of sociological investigation beyond court decisions is the analytical equivalent of ceasing to 'take judges' word for it'; policy makers do not exist in a disinterested limbo, nor do they exist to do the bidding of judicial decision-makers. Thus, court decisions which lack the consent (even if grudging) of policy makers face an uphill battle in attempting to inscribe judicial interpretations into policy language and steeper still in translating that policy language into on-the-ground activity. As the aftermath of the *Powley* decision demonstrates, the differences between judicial decrees and bureaucratic will can be vast, and intellectual lethargy on the part of sociology of law scholars does real disservice to the complexity of social reality as it manifests itself in these concrete contexts.

To frame this issue more theoretically, the Canadian bureaucratic and juridical field each attempt to produce symbolic capital: the Canadian bureaucratic field does so based on the idea that it is the result of a democratic will whereas juridical capital is based on the idea that it represents a neutral and objective arbiter. Each can be in conflict (to believe otherwise is to believe that neither judges nor politicians are self-interested) and indeed, although both sharing an underlying belief in the legitimacy of the Canadian state, the dominant players attempt to raise their own position within it by marginalizing the positions of those possessing other forms of capital – in doing so, they interact with competing visions of what Canada will look like in the future. The Supreme Court of Canada has, in the last two decades, been positioned in a place of some preeminence in the Canadian nation-state and it is in this context that we need to continue to study not just court doctrine but the constructions forwarded by political actors in the form of intervener factums; not simply because it is sociologically interesting but because social actors are increasingly turning towards the courts to seek redress for perceived injustices.

A century ago, Canadian courts were a dog on a leash for Canadian legislators; this is no longer the case. In fact, since the inception of the *Charter of Rights and Freedoms*, the Supreme Court of Canada has taken the opportunity of its newly ordained powers to stretch its juridical muscles. Given the backgrounds of most judges, that this exercising has tended to reproduce the status quo is unsurprising; it is important to note, however, that this reproduction occurred through a juridical lens – and in instances where the juridically and and non-juridically political visions of the world collide (such was the case in *R. v. Powley*), the juridical response will trump that of a straightforward political response which offends their (the judges') sensibilities. Moreover, to repeat, it seems an astonishing analytical omission to attempt to examine the impact of court decisions on social groups without accounting for the resistance (and in some cases, collusion) of the social groups involved in that struggle.

Directions for Future Research

I am often told that by the time one gets to the end of a dissertation (and before the defense), two emotions are usually present. First, you are absolutely tired of the research and cannot imagine ever doing research in that area again and second, you feel like its is ultimately incomplete and you see as weaknesses what are in fact boundaries that all academics face in doing research, regardless of what point in their careers they sit. Assuming I do not use the empirical materials and the completed dissertation itself as fire kindling, a number of future research avenues present themselves.

(1) Assessment of the long term consequences of *R. v. Powley* in the changing opportunity structure of the Canadian nation-state

Given the slow pace of government change with respect to Aboriginal rights issues, there is no easy way to assess the immediate impact of the *Powley* decision, even in the context of resource harvesting rights. A longer term project would need to follow the interaction and struggle between the Métis Nation of Ontario and the Ontario Ministry of Natural Resources (and the Ontario government more generally) over the next few years to better understand the consequences of the court decisions. Court cases are best understood as setting in motion the possibility of certain trajectories of struggle; only a longer term investigation would allow for the kinds of research that needs to be done to understand the impact of *Powley* on the Aboriginal landscape of Ontario. Likewise, since *R. v. Powley* is a Supreme Court of Canada decision and as such is binding to all parts of Canada[142], this future research could incorporate a larger study of the trajectories of Powley set into motion across *all* of Canada. Moreover, such a study could also use the opportunity to understand the networks of struggle between Métis political organizations themselves and what, if any, collective action they take to assist each other in pushing for change not just on harvesting issues but on their more general relationship with the government of Canada.

(2) Analysis of previous Aboriginal rights decisions examining all court documents

At least in Canada, the time has long since passed since sociology of law scholars can content themselves with a study of court decisions. Such decisions are the province of jurisprudential doctrinal scholars – if sociology of law is going to properly understand the power of courts, we need to examine entire court case files to nuance the ways in which social groups situate themselves (and, of course, are situated in) the juridical field. Although tedious, sociology of law scholars should take the opportunity to re-work previously researched court decisions in the larger context of the entirety of the court files. Courts need to be understood as mediums of struggle rather than external institutions which deliver justice (or oppression) from outside the discursive boundaries of legal actors. Understanding them thus would go a long way towards keeping the sensibilities of constitutive legal theorists (that we do not just live in 'law', 'law' lives in us) while still acknowledging the analytical importance of studying courts, not as sites of 'legal rules' but rather as a power medium of social struggle.

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[142] Although binding, court cases are still subject to any particular province's use of the Constitution Act, 1982's section 33 'notwithstanding' clause.

(3) investigate the symbolic power of 'law' among agents of the Aboriginal rights field

In order for fields to exist and reproduce themselves, those engaged in them must believe in their legitimacy and effectiveness. In this context, agents internal to this juridical field must, in Bourdieu's words, engage in a 'collective make-believe' to believe in the ultimate power of courts to effect social change. Thus, the power of cases like *R. v. Powley* is that they are supposed to lead to progressive social change for Aboriginal communities in the future. That is to say, the hope is that in addition to opening up negotiations for harvesting rights, progressive court cases can be used as an opportunity to explore other dimensions of a relationship between Métis people and the Ontario (and federal) government(s). The issue, as elaborated earlier in the conclusion, is the extent to which the Canadian juridical imagination can be stretched to allow for constitutional protections that would force governments to open up to these broader kinds of relationships. According to the Métis lawyers and politicians involved in the case, they are optimistic about the probable impact of *Powley*; they believe in the effectiveness of 'law' as a means of enacting progressive social change.

What is not clear from the court files, however, is how Métis politicians and activists understand as 'law' and more importantly, what they think counts as progressive social change. Thus, in addition to assessing the broader impact of *R. v. Powley*, a future project awaits the assessment of strategies of legal agents involved in the *Powley* decision, including the Powleys' lawyers, the provincial Crown as well as the eighteen additional interveners (admittedly, confidentiality concerns would be paramount here), More broadly, however, the issue for investigation is also that of why Aboriginal people believe in 'law' at all. What are the sorts of cultural meanings they attribute to it and to what extent do they believe it moves the yardsticks for Aboriginal communities and nations in the context of progressive social change? One does not need to displace the study of the court files in order to understand the broader rippling effects they engender – indeed, given the power of courts in contemporary Canadian society, court files are an excellent place to begin when attempting to pursue this broader objective.

Afterward: Métis Identity, Neck Bone Soup and 'Rababoo'

July, 2002: I've driven the six hours from Edmonton to Batoche to attend Batoche Days, the annual Métis celebration held at the historic battleground between Métis troops and Canada's army during the 1885 Battle of Batoche. As thousands converge on its lush, rolling hills, we begin to set up all manner of shelter, from a canvass sheet propped up on branches to $200,000 luxury motor homes to everything in between. We listen to fiddling, watch jigging, plays and talent contests, Voyageur strength games, eat bannock with whatever venders pile on it and generally catch up with extended family and friends. Early in the evening on the second day, I meet the producer of a French camera crew filming a documentary about the legacy of centuries of French contact in other countries. He has traveled to Canada to interview the Métis descendents of the original French Voyageurs who came to Canada from France in the sixteenth and seventeenth centuries. He looks vaguely disappointed though and, discovering that I'm a professor, he whispers to me his exasperation about the fact that the younger Métis don't even speak French! He seems frustrated because there is not much that is obviously different about (his) 'us' – at least, we certainly don't seem Aboriginal in the same way 'First Nations' do. He can't place us; many of us 'look' the part, and yet we seem to act more like cowboys than Indians.

Feeling somewhat defensive, I ask him what he expected to find. His answer sounds as though he has at least taken the time to immerse himself in Métis history. I point out to him that France has changed considerably since the French revolution in the late 1700s, so why should Métis not be allowed and expected to change? He sees my point, yet my comments ring hollow; he still seems dissatisfied. His crew member approaches and whispers something in French; he quickly thanks me for my time and they pile into their rental vehicle and drive off in a cloud of dust, no doubt in search of a powwow down the road. Feeling frustrated and oddly offended by our conversation, I traverse the hoards of exasperated mothers and dusty, sticky children to my family's camp site on the Batoche grounds.

When I get there, one of my uncles is among the four or five people seated around the camp fire. My uncles embody much of what, for me, it means to be Métis. They are huge, dark, charismatic men with massive, gnarled, tattooed hands and forearms, dark, flashing eyes, jet-black mustaches and booming laughs. While I have never seen them violent, they exude an aura that says they would be, cheerfully, if the situation ever arose. My uncle Ralph, his trademark cigarette dangling precariously from his lips, is making neck-bone soup in a large, dented pot set in the coals of an open camp fire. One by one the potatoes he is peeling disappear into his huge, brown hands. They are expertly quartered, and tossed 'plunk!' into the pot. He sees me coming and says 'hey hey my boy! Come pull of a chair next to uncle! The soup's got awhile yet!' I grab a lawn chair and sit down beside the fire, taking good-natured ribbing about the weight I've put on since I became a professor. No one seems to be talking about anything in particular, just cracking jokes and listening to the sounds of the festival – the constant din of fiddles and guitars tuning up in the background, kids shrieking happily, the master of ceremonies' voice booming in the background, waiting for our bowl of neck bones and bannock. I remember thinking at the time that I had never felt more Métis in my life. I remember thinking, it must be sad for people not to feel this sense of belonging.

The following evening, a Métis theatre company presents a play entitled *Rababoo*[143] to a packed house of nearly a thousand. The play is about a Métis youth who goes off to war, and his promised bride-to-be, Geraldine, who waits for him to come home. It was narrated from the point of view of the bride-to-be in her later, married years – there is thus a 'Young Geraldine' and an 'Old Geraldine'. The play is eloquent and poignant, juxtaposing the crushing poverty of that era – at one point Old Geraldine explains to the audience how to add 'Métis parsley' to one's stew by chopping up blades of grass – with a dry and deadpan wit used to shrug off and rise above the indignity of such ingredients. The Old Geraldine steals the show. Standing by a stew pot, she reminisces through a wonderful 'double speak', speaking seamlessly to the audience in English, Cree and Michif. The racier sexual parts of the play are presented in Cree and Michif and are understood only by older adults, while the play's tamer parts are relayed in English. As those my age and younger sit beside our aunties, uncles, kokums and mushums, we began to badger them to translate. They do so at first, but soon became annoyed by our constant interruptions (or at least, my kokum did). Although we all laugh at the clever English monologue and the plays on words, the older people literally howl during the Cree and Michif parts, tears streaming down their faces.

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[143] Rababoo is a kind of stew. It's basically a meal prepared with whatever is on hand, a mixture of bits and pieces of various kinds of foodstuff.

Immediately following the play the crowds break up. We walk back to the cheerfulness of our campfires, chewing on moose-pepperoni and listening to Johnny Cash, Hank Williams and Lefty Frizzell wannabees sing in front of the fire; very few head to sleep. For myself, the play was marvelous and it was heartening to see so many in attendance. However, I couldn't help but be saddened by the fact that so much of the play was incomprehensible to me; so much richness of detail and elegance of wit were lost in my inability to understand Michif or Cree. Conversely, the next morning the old people were *still* chuckling to themselves and were, in the way of people for whom oral rather than written language is the preferred mode of comprehending reality, constructing endless double-entendres and plays on the various jokes from the previous night's entertainment. As I sat by the fire the next morning waiting for breakfast, I couldn't help but think that there is nothing worse than being on the outside looking in. It is a sad feeling sometimes to feel like you are at the crossroads of a culture that may be gone from your family three generations from now and perhaps totally gone in three more.

At an abstract enough level, 'law' is responsible for all social change in that it either facilitates or thwarts it. But using 'law' to explain social change in this manner is like explaining NASCAR race-car diving by saying 'they go that way *really* fast and when they see a turn, they turn'. Far more finely grained investigations need to be carried out to investigate the numerous nodes of social power through (and against) which Métis communities and families struggle to survive – some may survive as Métis, some may not. Court decisions, legislative enactments or even the refusal of legal actors to make certain social relations juridical, will play a socially and historically contingent role in struggle; in some cases it will play a more direct role while in others, a more subtle one.

The more pressing danger for Métis communities, however, is not whether we win or lose particular harvesting cases. As unjust as it may seem from a juridical standpoint, having to pay for a hunting licence is not going to eradicate Métis culture and communities. The real danger comes from Métis communities crumbling slowly away, a generation at a time, as younger community members are, for lack of local employment or education opportunities, forced to go elsewhere to make a life for themselves. This in itself is not necessarily fatal – it becomes more worrisome, however, when these families move to new locales and do not link themselves into that new locale's Native community.

My more general point is that theories of Métis (and more generally, Aboriginal) identity loss need to provide a more sophisticated view of how it occurs; we need to broaden our research out of the 'oppression' paradigm. At least as big a danger for Métis identity and community loss as court defeats (positioned as one form of oppression) is economic integration into middle class lifestyles and communities away from the concentration and density of culture – real, *lived* culture, not the reified, 'workshop' culture taught to white people – which comes from growing up in a Native community. Paradoxically, the real danger in Canada is thus not that the Canadian government will continue to oppress Native communities through the courts or through recalcitrant Ministries of Natural Resources but rather, that it will continue to channel the kinds of social opportunities available to possess a reasonable quality of life in ways that lead to the loss of Aboriginal identity. 'Law', and the courts more specifically, will certainly participate in this channeling but they are only one player in a larger game. Ultimately, by themselves court victories will do little to change the conditions which will allow for future Métis cultures and communities to persist; all they can do is provide trajectories of hope. It is not false hope, necessarily, but Métis are fools to think that using the courts will guarantee our collective futures; the hard thing is, given the current power of the courts in Canadian society, we would equally be fools to avoid using them.

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